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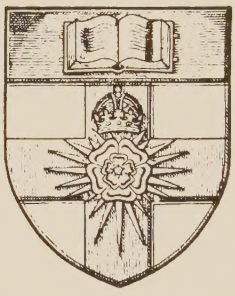

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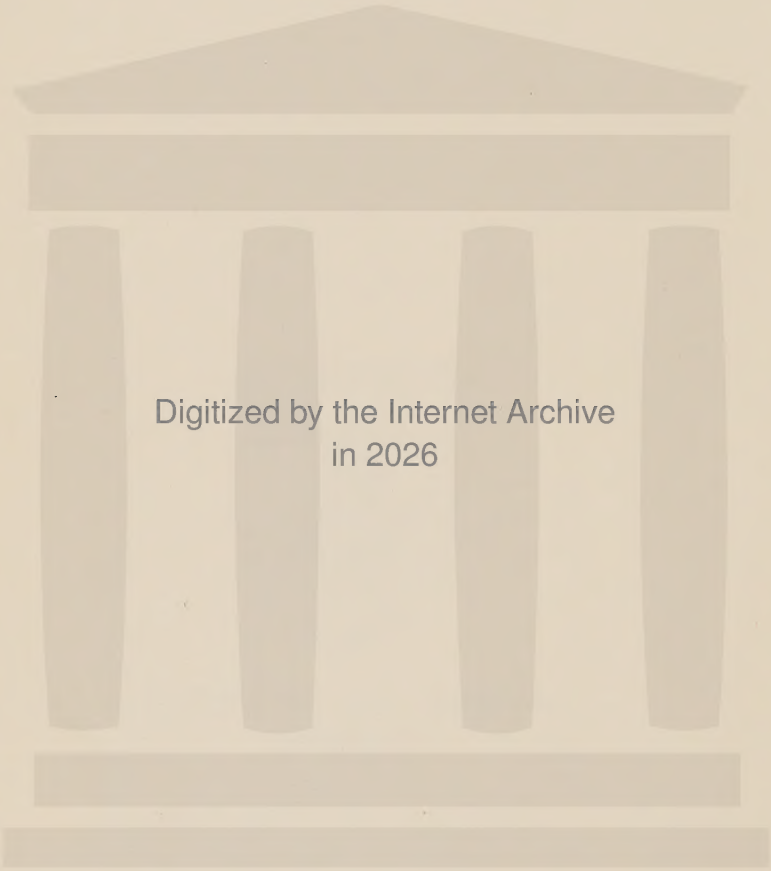
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TABLE OF CASES REPORTED

IN THIS VOLUME.

A.

	PAGE
Albany Street Police Station Superintendent, Rex *v.*	716
Anglo-Mexican Petroleum Products Company, F. A. Tamplin Steamship Company *v.*	668
Anness *v.* Grivell	685
Arlidge *v.* Scrase	325
Associated Newspapers, Ld. *v.* London Corporation (No. 2) (C. A.)	128
Assurance (London) Corporation, Becker, Gray & Co. *v.*	410
Atkinson *v.* Morgan	23
Austin Friars Steamship Company *v.* Spillers & Bakers (C. A.)	586
Aylmer, Derby (Earl) *v.*	374

B.

Barron *v.* Potter (C. A.)	593
Beacontree Justices, Rex *v.*	388
Beal *v.* Horlock	203
—— *v.* ——- (C. A.)	627
Becker, Gray & Co. *v.* London Assurance Corporation	410
Bermondsey Borough Council, London County Council *v.*	305
Blakey *v.* Harrison	258
Bloomsbury Income Tax Commissioners, Rex *v.*	768
Board of Trade, Rex *v.* (C. A.)	536
Bognor Urban Council, Monro *v.* (C. A.)	167
Bothamley *v.* Jolly	425
Bradford Corporation, Thompson *v.*	13
Bradshaw *v.* Waterlow & Sons (C. A.)	527
Brewing (Colchester) Company *v.* Tendring Licensing Justices	48
Bruce *v.* McManus	1
Buerger, Fratelli Sorrentino *v.* (C. A.)	367

C.

Cadogan (Earl), King *v.* (C. A.)	485
Cannon *v.* Jefford	477
Cardiff City Council, Glamorgan County Council *v.* (C. A.)	438
Carlisle, Garston Overseers *v.*	381
Carson Roberts, Rex *v.* Ex parte Stepney Corporation (C. A.)	313
Central Midwives Board, Stock *v.*	756

		PAGE
Chatterton *v.* Glanford Rural Council		707
Cheshire County Council, Stoke-on-Trent Borough Council *v.*		699
Clark, Leavett *v.*		9
Colchester Brewing Company *v.* Tendring Licensing Justices		48
Cooper *v.* Wales	(C. A.)	210

D.

Dalton, Savill *v.*	(C. A.)	174
Davidson *v.* New Tabernacle Approved Society		569
Derby (Earl) *v.* Aylmer		374
Direction der Disconto Gesellschaft, Leader *v.*	(C. A.)	154
Dominion of Canada News Company, Neville *v.*	(C. A.)	556
Dowling, Harrison (J. & C.) *v.*	(C. A.)	218
Duncan, Fox & Co. *v.* Schrempft & Bonke	(C. A.)	355

F.

Fenwick (W. F.) & Co. *v.* Merchants' Marine Insurance Company	(C. A.)	290
Financial Times, Maisel *v.*	(C. A.)	336
Fratelli Sorrentino *v.* Buerger	(C. A.)	367

G.

Garston Overseers *v.* Carlisle		381
Glamorgan County Council *v.* Cardiff City Council	(C. A.)	438
Glanford Rural Council, Chatterton *v.*		707
Good, Tratt *v.*		59
Greenwood *v.* Nall & Co.	(C. A.)	97
Grivell, Anness *v.*		685

H.

Harrison, Blakey *v.*		258
——— (J. & C.) *v.* Dowling	(C. A.)	218
Harrison Brothers & Co. and Shipton, Anderson & Co., In re		676
Horlock, Beal *v.*		203
———, ——— *v.*	(C. A.)	627
Horner, Maskell *v.*	(C. A.)	106
Hussey-Freke, Roper *v.*	(C. A.)	222
Huth *v.* Huth	(C. A.)	32

I.

Insurance (Merchants' Marine) Company, Fenwick (W. F.) & Co. *v.*	(C. A.)	290
Insurance (North British and Mercantile) Company, Recher & Co. *v.*		277

J.

Jefford, Cannon *v.*		477
Jolly, Bothamley *v.*		425

K.

King *v.* Cadogan (Earl)	(C. A.)	485

L.

Lane *v.* Lusty (W.) & Son	(C. A.)	230
Leader *v.* Direction der Disconto Gesellschaft	(C. A.)	154
Leavett *v.* Clark		9
Lemy *v.* Watson		731
Lewis, Williams *v.*		493
Light Railway Commissioners, Rex *v.*	(C. A.)	536
London Assurance Corporation, Becker, Gray & Co. *v.*		410

PAGE

London Corporation, Associated Newspapers, Ld. *v.* (No. 2) (C. A.) 128
London County Council *v.* Bermondsey Borough Council 305
——————, Notley *v.* 580
Luckie *v.* Merry (C. A.) 83
Lusty (W.) & Son, Lane *v.* (C. A.) 230

M.

McGregor *v.* Telford 237
McManus, Bruce *v.* 1
Maisel *v.* Financial Times (C. A.) 336
Manchester Insurance Committee, O'Driscoll *v.* (C. A.) 499
Maskell *v.* Horner (C. A.) 106
Merchants' Marine Insurance Company, Fenwick (W. F.) & Co. *v.* (C. A.) 290
Merry, Luckie *v.* (C. A.) 83
Midland Railway Company, Read, Holliday & Sons *v.* (C. A.) 616
Miller *v.* Richardson (C. A.) 76
Monro *v.* Bognor Urban Council (C. A.) 167
Morgan, Atkinson *v.* 23
Moss' Empires, Williams *v.* 242

N.

Nall & Co., Greenwood *v.* (C. A.) 97
Neville *v.* Dominion of Canada News Company (C. A.) 556
New Tabernacle Approved Society, Davidson *v.* 569
News (Dominion of Canada) Company, Neville *v.* (C. A.) 556
Newspapers (Associated), Ld. *v.* London Corporation (No. 2) (C. A.) 128
North British and Mercantile Insurance Company, Recher & Co. *v.* 277

PAGE

Notley *v.* London County Council 580

O.

O'Driscoll *v.* Manchester Insurance Committee (C. A.) 499
Ounsworth *v.* Vickers 267
Oxfordshire County Council, Ex parte. Rex *v.* Radcliffe (Judge) 418

P.

Petition of Right, In re (C. A.) 649
Petroleum Products (Anglo-Mexican) Company, F. A. Tamplin Steamship Company *v.* 668
Pilet, In re. Ex parte Toursier & Co. 519
Potter, Barron *v.* (C. A.) 593
Proctor *v.* Serbino (Owners of S.S.) (C. A.) 344

R.

Radcliffe (Judge), Rex *v.* Ex parte Oxfordshire County Council 418
Read, Holliday & Sons *v.* Midland Railway Company (C. A.) 616
Recher & Co. *v.* North British and Mercantile Insurance Company 277
Rederiaktiebolaget Luggude, Wall *v.* 66
Rex *v.* Albany Street Police Station Superintendent 716
—— *v.* Beacontree Justices 388
—— *v.* Bloomsbury Income Tax Commissioners 768
—— *v.* Board of Trade (C. A.) 536
—— *v.* Carson Roberts. Ex parte Stepney Corporation (C. A.) 313
—— *v.* Light Railway Commissioners (C. A.) 536
—— *v.* Radcliffe (Judge). Ex parte Oxfordshire County Council 418

		PAGE
Rex *v.* Richards	(C. A.)	402
—— *v.* Ward	(C. C. A.)	696
—— *v.* Williams	(C. A.)	402
—— *v.* Wright		388
Richards, Rex *v.*	(C. A.)	402
Richardson, Miller *v.*	(C. A.)	76
Roper *v.* Hussey-Freke	(C. A.)	222

S.

St. Marylebone Borough Council, White *v.*		249
Savill *v.* Dalton	(C. A.)	174
Schrempft & Bonke, Duncan, Fox & Co. *v.*	(C. A.)	355
Scrase, Arlidge *v.*		325
Seal *v.* Turner	(C. A.)	194
Serbino (Owners of S.S.), Proctor *v.*	(C. A.)	344
Shipton, Anderson & Co. and Harrison Brothers & Co., In re		676
Spillers & Bakers, Austin Friars Steamship Company *v.*	(C. A.)	586
Steamship (Austin Friars) Company *v.* Spillers & Bakers	(C. A.)	586
Steamship (F. A. Tamplin) Company *v.* Anglo-Mexican Petroleum Products Company		668
Stepney Corporation, Ex parte. Rex *v.* Carson Roberts	(C. A.)	313
Stock *v.* Central Midwives Board		756
Stoke-on-Trent Borough Council *v.* Cheshire County Council		699

T.

		PAGE
Tamplin (F. A.) Steamship Company *v.* Anglo-Mexican Petroleum Products Company		668
Telford, McGregor *v.*		237
Tendring Licensing Justices, Colchester Brewing Company *v.*		48
Thompson *v.* Bradford Corporation		13
Toursier & Co., Ex parte. In re Pilet		519
Tratt *v.* Good		59
Turner, Seal *v.*	(C. A.)	194

V.

Vickers, Ounsworth *v.*		267

W.

Wales, Cooper *v.*	(C. A.)	210
Wall *v.* Rederiaktiebolaget Luggude		66
Ward, Rex *v.*	(C. C. A.)	696
Waterlow & Sons, Bradshaw *v.*	(C. A.)	527
Watson, Lemy v.		731
White *v.* St. Marylebone Borough Council		249
William France Fenwick & Co. *v.* Merchants' Marine Insurance Company	(C. A)	290
Williams *v.* Lewis		493
———— *v.* Moss' Empires		242
————, Rex *v.*	(C. A.)	402
Wright, Rex *v.*		388

TABLE OF CASES CITED.

A.

		PAGE
Abram Coal Company *v.* Southern	[1903] A. C. 306	225
Abrath *v.* North Eastern Railway Company	11 Q. B. D. 79, 440; 11 App. Cas 247	530
Adams *v.* Graham	33 L. J. (Q.B.) 71	599
Aiken *v.* Short	1 H. & N. 210	109
Allen *v.* Sharp	2 Ex. 352	771
——— *v.* Thompson	1 H. & N. 15	612
Amersham Union *v.* City of London Union	20 Q. B. D. 103	702
Andersen *v.* Marten	[1908] A. C. 334	630
Appleby *v.* Horseley Company	[1899] 2 Q. B. 521	576
Apthorpe *v.* Peter Schoenhopen Brewing Company	4 Tax Cas. 41	772
Arnold & Butler *v.* Bottomley	[1908] 2 K. B. 151	339
Ashmore *v.* Cox	[1899] 1 Q. B. 436	678
Ashworth *v.* Outram	9 Ch. D. 483	201
Associated Newspapers *v.* London Corporation (No. 1)	[1914] 2 K. B. 603; [1915] A. C. 674	136
Atlee *v.* Backhouse	3 M. & W. 633	116
Attorney-General *v.* Horner	14 Q. B. D. 245; 11 App. Cas. 66	108, 655
——— *v.* ——— (No. 2)	[1913] 2 Ch. 140	106
Austin *v.* Mills	9 Ex. 288	176
Austin Friars Steam Shipping Company *v.* Strack	[1905] 2 K. B. 315	206, 630

B.

Bacon *v.* Bacon	Cro. Car. 601	719
Baily *v.* De Crespigny	L. R. 4 Q. B. 180	678
Bankruptcy Notice, In re a	[1895] 1 Q. B. 609	177
Barlow *v.* Terrett	[1891] 2 Q. B. 107	429
Barnabas *v.* Bersham Colliery Company	103 L. T. 513	345
Barnett *v.* Eastman	67 L. J. (Q.B.) 517	507
Barraclough *v.* Brown	[1897] A. C. 615	63
Barron *v.* Potter	[1914] 1 Ch. 895	601
Barrow, Ex parte	18 Ch. D. 464	522
Baxter's Leather Company *v.* Royal Mail Steam Packet Company	[1908] 2 K. B. 626	71
Beale *v.* Thompson	4 East, 546; 1 Dow, 299,	206, 629
Beamish *v.* Dairy Supply Company	13 Times L. R. 484	34
Beardsley *v.* Giddings	[1904] 1 K. B. 847	391
Beauchamp (Earl) *v.* Winn	L. R. 6 H. L. 223	112
Bebb *v.* Bunny	1 K. & J. 216	385
Bedwell *v.* London Electric Railway Company	(1914) W. C. & Ins. Rep. 408	212

		PAGE
Bender *v.* Zent (Owners of S.S.)	[1909] 2 K. B. 41	345
Berkeley *v.* Elderkin	1 E. & B. 805	176
Biddell Brothers *v.* Clemens Horst Company	[1911] 1 K B. 214, 934; [1912] A. C. 18	358
Billing *v.* Prebble	66 L. J. (Q.B.) 180	436
Birkley *v.* Presgrave	1 East, 220	588
Bishop *v.* Shillito	2 B. & Al. 329, n.	679
Blackford *v.* Dod	2 B. & Ad. 179	531
Blackwell *v.* England	8 E. & B. 541	702
Blake *v.* Shaw	John. 732	376
Blankley *v.* Winstanley	3 T. R. 279	397
Bodega Company *v.* Read	[1914] 2 Ch. 283	62
Boedes Lust, The	5 C. Rob. 233	630
Booth *v.* Trail	12 Q. B. D. 8	507
Boulter *v.* Kent Justices	[1897] A. C. 556	421
Bourgoise, In re	41 Ch. D. 310	718
Boyd, In re	[1895] 1 Q. B. 611	179
Bradley *v.* Baylis	8 Q. B D. 195	317
Brame *v.* Commercial Gas Company	[1914] 3 K. B. 1181	16
Branscombe *v.* Scarbrough	6 Q. B. 13; 13 L. J. (Q.B.) 247	72
Brewster *v.* Kitchell	1 Salk. 198	683
Brisbane *v.* Dacres	5 Taunt. 143	113
Bristol Poor (Governors) *v.* Wait	1 Ad. & E. 264	774
British Cast Plate Manufacturers *v.* Meredith	4 T. R. 794	656
British Waggon Company *v.* Lea	5 Q. B. D. 149	370
Brittain *v.* Kinnaird	1 Brod. & B. 432	771
Brough *v.* Homfray	L. R. 3 Q. B. 771	27
Brown *v.* Cocking	L. R. 3 Q. B. 672	771
——— *v.* Hawkes	[1891] 2 Q. B. 718	531
——— *v.* M'Kinally	1 Esp. 278	122
——— *v.* Turner, Brightman & Co.	[1912] A. C. 12	673
——— (John) & Co. *v.* Hunter	49 Sc. L. R. 695	212
Buccleuch (Duke) *v.* Metropolitan Board of Works	L. R. 5 H. L. 418	284
Buckler *v.* Wilson	[1896] 1 Q. B. 83	391
Bunbury *v.* Fuller	9 Ex. 111	776
Burwash *v.* Leyland (F.) & Co.	5 B. W. C. C. 663	346
Butler *v.* Wildman	3 B. & Al. 398	415
Button *v.* Thompson	L. R. 4 C. P. 330	632

C.

Caistor Rural Council *v.* Taylor	71 J. P. 310	388
Calvin's Case	7 Rep. 18a	717
Camden *v.* Inland Revenue Commissioners	[1914] 1 K. B. 641; [1915] A. C. 241	488
Campbell, Ex parte	L. R. 5 Ch. 703	262
Capital and Counties Bank *v.* Henly	7 App. Cas. 741	34
Carter *v.* Lang (John) & Sons	1 B. W. C. C. 379	98
Carus-Wilson, In re	18 Q. B. D. 7	283
Cave *v.* Mountain	1 Man. & G. 257.	790
Caygill *v.* Thwaite	49 J. P. 614	11
Chambers *v.* Goldthorpe	[1901] 1 K. B. 624	284
Chance & Hunt *v.* London and North Western Railway Company	[1909] 1 K. B. 550; 13 Ry. & Ca. Tr. Cas. 286	619
Charleton *v.* Alway	11 Ad. & E. 993	774

		PAGE
Chile, The	[1914] P. 212	635
Chinery, In re	12 Q. B. D. 342	179
Clifford *v.* Watts	L. R. 5 C. P. 577	684
Clutterbuck *v.* Chaffers	1 Stark. 471	34
Coles *v.* Turner	L. R. 1 C. P. 373	523
Colonial Bank of Australasia *v.* Willan	L. R. 5 P. C. 417	789
Colquhoun *v.* Brooks	14 App. Cas. 493	775
Cooper, In re	[1911] 2 K. B. 550	385
——— *v.* Cadwalader	5 Tax Cas. 101	777
——— *v.* Phibbs	L. R. 2 H. L. 149	112
Cork Rural District Council *v.* Walsh	[1908] 2 I. R. 234	429
Coulson *v.* South Moor Colliery Company	[1915] W. N. 83; 8 B. W. C. C. 253	85
Cox *v.* Bowen	[1911] 2 K. B. 611	508
Crane *v.* Lawrence	25 Q. B. D. 152	428
Cressy *v.* South Metropolitan Gas Company	94 L. T. 790	16
Crow *v.* Davis	89 L. T. 407	252
—— *v.* ——- (No. 2)	91 L. T. 88	252
Cunningham *v.* Dunn	3 C. P. D. 443	629
Curling *v.* Long	1 Bos. & P. 634	632

D.

Daniel *v.* Coulsting	7 Man. & G. 122	316
——— *v.* McCarthy	7 Ir. C. L. Rep. 261	508
Dartford Brewery Company *v.* County of London Quarter Sessions	[1906] 1 K. B. 695	51
Dashwood *v.* Ayles	16 Q. B. D. 295	317
Davidson *v.* M'Leod	42 J. P. 43	690
Davies, In re	77 L. T. 567	603
——— *v.* Alliance Insurance Company	Unreported. Cited in Russell on Arbitrations, 9th ed. p. 50	169
——— *v.* Craven	[1907] 2 Ch. 448	385
——— *v.* Crown Perfumery Company	6 B. W. C. C. 649	231
Davis *v.* Hardy	6 B. & C. 225	532
Dawson *v.* Vansandau	11 W. R. 516	531
Dean *v.* Bennett	L. R. 6 Ch. 489	583
De Beers Consolidated Mines *v.* Howe	[1906] A. C. 455	777
De Geer *v.* Stone	22 Ch. D. 243	721
Delacroix *v.* Thevenot	2 Stark. 63	34
Delamainer *v.* Winteringham	4 Camp. 186	206, 631
De Peyer *v.* Rex	100 L. T. 256	385
Dimech *v.* Corlett	12 Moo. P. C. 199	70, 370
Doe *v.* Courtenay	11 Q. B. 702	245
—— *v.* Poole	11 Q. B. 713	245
Douglas *v.* Corbett	6 E. & B. 511	530
Drax, In re	57 L. T. 475	252
Dunlop Pneumatic Tyre Company *v.* New Garage and Motor Company	[1913] 2 K. B. 207	508

E.

Eager *v.* Dyott	5 C. & P. 4	531
East London Railway Company *v.* River Thames Conservators	48 Sol. J. 492	196
Eddington *v.* Borman	4 T. R. 4	135
Edmunds *v.* Edmunds	[1904] P. 362	507

		PAGE
Elizabeth, The	2 Dods. 403	207, 632
Elston *v.* Rose	L. R. 4 Q. B. 4	771
Embiricos *v.* Sydney Reid & Co.	[1914] 3 K. B. 45	207, 629
Esposito *v.* Bowden	7 E. & B. 763	360, 630, 678
Evans *v.* Conway Justices	[1900] 2 Q. B. 224	52

F.

Farmer *v.* Scottish North American Trust	[1912] A. C. 118	385
Feast *v.* Robinson	63 L. J. (Ch.) 321	598
Feldmann, In re	71 J. P. 269	760
Firth *v.* McPhail	[1905] 2 K. B. 300	425
Fitch *v.* Weber	6 Hare, 51	718
Fitzpatrick, In re	19 L. R. Ir. 206	599
Florence, The	16 Jur. 572	207, 642
Ford *v.* Cotesworth	L. R. 5 Q. B. 544	629
Fowler *v.* Cripps	[1906] 1 K. B. 16	737
Fraser *v.* Fraser	[1904] 1 K. B. 56	508
——— *v.* ——— (No. 2)	[1905] 1 K. B. 368	508
——— *v.* Pendlebury	31 L. J. (C.P.) 1	113
Freeland *v.* Summerlee Iron Company	49 Sc. L. R. 841	216
Friends, The	4 C. Rob. 143	630
Fulham *v.* Down	6 Esp. 26, n.	113
Furber *v.* Taylor	[1900] 2 Q. B. 719	175
Furnival *v.* Johnson's Iron and Steel Company	5 B. W. C. C. 43	346

G.

Gateshead Corporation *v.* Lumsden	[1914] 2 K. B. 883	385
Geary *v.* Ginzler	6 B. W. C. C. 72	231
Geipel *v.* Smith	L. R. 7 Q. B. 404	207, 629
Giles *v.* Grover	1 Cl. & F. 72	161
Gill *v.* Fortescue & Sons	6 B. W. C. C. 577	98
Giraud *v.* Richmond	2 C. B. 835	244
Godard *v.* Gray	L. R. 6 Q. B. 139	68
Godfrey *v.* George	[1896] 1 Q. B. 48	175
Godts *v.* Rose	25 L. J. (C.P.) 61	679
Gomersall *v.* Davies	14 Times L. R. 430	34
Goslings & Sharpe *v.* Blake	23 Q. B. D. 324	385
Goss *v.* Nugent (Lord).	5 B. & Ad. 58	244
—— *v.* Withers	2 Burr. 683	630
Gramophone and Typewriter Company *v.* Stanley	[1908] 2 K. B. 89	772
Granite Supply Association *v.* Inland Revenue Commissioners	8 F. 55; 5 Tax Cas. 168	271
Grant *v.* Easton	13 Q. B. D. 302	191
——— *v.* Glasgow and South Western Railway Company	1908 S. C. 187	346
——— *v.* Langston	[1900] A. C. 383	317
Grayson, Lowood & Co. *v.* Great Central and other Railway Companies	13 Ry. & Ca. Tr. Cas. 281	619
Great Western Railway Company *v.* Sutton	L. R. 4 H. L. 226	113
Greaves' Settlement, In re	23 Ch. D. 313	139
Greenham *v.* Child	24 Q. B. D. 29	502
Gridley *v.* Swinborne	52 J. P. 791	744

		PAGE
Griggs *v.* Stevens	74 J. P. 67	317
Groom *v.* Barber	[1915] 1 K. B. 316	359
Gulliver *v.* Cosens	1 C. B. 788	116

H.

Hadkinson *v.* Robinson	3 Bos. & P. 388	413
Hadley *v.* Clarke	8 T. R. 259	207, 629
Hamlyn *v.* Wood	[1891] 2 Q. B. 488	679
Hardy *v.* Bern	5 T. R. 636	72
Harrison *v.* Whitaker Brothers	16 Times L. R. 108	231
——— *v.* Wright	13 East, 343	68
Hayward *v.* Westleigh Colliery Company	[1915] A. C. 540	76
Healey *v.* Galloway	41 Ir. L. T. 5	83
Hebert *v.* Royal Society of Medicine	56 Sol. J. 107	194
Hewer *v.* Cox	3 E. & E. 428	502
Hicks *v.* Faulkner	8 Q. B. D. 167; 46 L. T. 127	530, 532
Hill *v.* Tottenham Urban Council	15 Times L. R. 53	14
Hobbs *v.* Winchester Corporation	[1910] 2 K. B. 471	433
Hochster *v.* De la Tour	2 E. & B. 678	370
Hole *v.* Barlow	4 C. B. (N.S.) 334	652
Holmes *v.* Piper	[1914] 1 K. B. 57	744
Hopwood *v.* Barefoot	11 Mod. 237	138
Horder *v.* Meddings	44 J. P. 234	690
Horsley *v.* Cox	L. R. 4 Ch. 92	508
Houghton *v.* Sutton Heath and Lea Green Collieries Company	[1901] 1 K. B. 93	225
Howe *v.* Newington Licensing Justices	[1907] 2 K. B. 340	53
Howell *v.* Coupland	1 Q. B. D. 258	678
Hurst *v.* Hurst	4 Ex. 571	68

I.

Inland Revenue Commissioners *v.* St. John's College, Oxford	[1915] 2 K. B. 621	489
Ionides *v.* Universal Marine Insurance Company	14 C. B. (N.S.) 259	291
Ipswich Union *v.* Forehoe Union	77 J. P. 467	702
Iredale *v.* China Traders Insurance Company	[1899] 2 Q. B. 356	589
Ireland *v.* Livingston	L. R. 5 H. L. 395	359
Islington Borough Council *v.* London School Board	[1903] 2 K. B. 354	135

J.

Jackson *v.* Union Marine Insurance Company	L. R. 10 C. P. 125	629
Jacobs *v.* Crédit Lyonnais	12 Q. B. D. 589	678
Janson *v.* Driefontein Consolidated Mines	[1902] A. C. 484	562
Johnson *v.* Drummond	11 Ex. 73	507
Jones *v.* Llanrwst Urban Council	[1911] 1 Ch. 393	196
——— *v.* Ocean Coal Company	[1899] 2 Q. B. 124	99, 576

		PAGE
Jones *v.* Thompson	27 L. J. (Q.B.) 234; E. B. & E. 63	507
Jureidini *v.* National British and Irish Millers Insurance Company	[1915] A. C. 499	69

K.

Kacianoff *v.* China Traders Insurance Company	[1914] 3 K. B. 1121	413
Karberg & Co. *v.* Blythe & Co.	[1915] 2 K. B. 379	359, 413
Kelly *v.* Solari	9 M. & W. 54	109
Kemble *v.* Addison	[1900] 1 Q. B. 430	598
Kennedy *v.* Barrow-in-Furness Corporation	Reported in Hudson on Building Contracts, 4th ed. vol. 2, p. 411	169
Kerr *v.* Ayr Steam Shipping Company	[1915] A. C. 217	345
King's Lynn Harbour Moorings Commissioners, In re	1 Tax Cas. 23	272
Kirkwood *v.* Webster	9 Ch. D. 239	201
Kirshenboim *v.* Salmon	[1898] 2 Q. B. 19	745
Knibbs *v.* Hall	1 Esp. 84	116
Krell *v.* Henry	[1903] 2 K. B. 740	672, 678
Kydd *v.* Liverpool Watch Committee	[1907] 2 K. B. 591; [1908] A. C. 327	458

L.

Lancashire and Yorkshire Railway Company *v.* Gidlow	L. R. 7 H. L. 517	113
Lancashire Justices *v.* Newton-in-Makerfield Commissioners	11 App. Cas. 416	458
——— *v.* Rochdale Corporation	8 App. Cas. 494	458
Lancaster *v.* Elce	31 Beav. 325	522
Landauer *v.* Craven & Speeding Brothers	[1912] 2 K. B. 94	359
Larchin *v.* North Western Deposit Bank	L. R. 10 Ex. 64	597
Lea *v.* Charrington	23 Q. B. D. 45, 272	530
Lecky & Co. *v.* Ogilvy, Gillanders & Co.	3 Com. Cas. 29	359
Lee *v.* Stag Line Company	(1912) W. C. & Ins. Rep. 398	346
Leeds Permanent Benefit Building Society *v.* Mallandaine	[1897] 2 Q. B. 402	385
Leitrim, The	[1902] P. 256	588
Lester *v.* Torrens	2 Q. B. D. 403	260
Lindon *v.* Hooper	Cowp. 414	116
Linotype Company *v.* British Empire Type-setting Machine Company	81 L. T. 331	34
Lister *v.* Perryman	L. R. 4 H. L. 521	531
Liverpool Gas Company *v.* Everton	L. R. 6 C. P. 414	773
Lloyd *v.* Sheen	93 L. T. 174	631
London and Eastern Counties Loan and Discount Company *v.* Creasey	[1897] 1 Q. B. 768	377
London Corporation *v.* Cox	L. R. 2 H. L. 239	774
——— *v.* Netherlands Steamboat Company	[1906] A. C. 263	136

		PAGE
London County Council *v.* Bermondsey Bioscope Company	[1911] 1 K. B. 445	4
——— *v.* Davis	77 L. T. 693	252
——— *v.* District Surveyors Association	[1909] 2 K. B. 138	582
Lowe *v.* Myers (M.) & Sons	[1906] 2 K. B. 265	85
—— *v.* Pearson	[1899] 1 Q. B. 261	231
—— *v.* Peers	4 Burr. 2225	67
Loweth *v.* Fothergill	4 Camp. 185	266
Luckin *v.* Hamlyn	21 L. T. 366	593
Lynch *v.* Lansdowne (Marquis)	48 Ir. L. T. 89	83

M.

McClelland *v.* Manchester Corporation	[1912] 1 K. B. 118	14
M'Cowan *v.* Baine	[1891] A. C. 401	291
McHattie, Ex parte	10 Ch. D. 398	599
Mackinnon *v.* Miller	2 B. W. C. C. 64	346
Maisel *v.* Financial Times	31 Times L. R. 192	336
Mallinson *v.* Carr	[1891] 1 Q. B. 48	429
Mapperley Colliery Company *v.* Midland Railway Company	9 Ry. & Ca. Tr. Cas. 147	619
Marie Glaeser, The	[1914] P. 218	644
Marshall *v.* Lynn	6 M. & W. 109	245
——— *v.* Ross	L. R. 8 Eq. 651	745
——— *v.* Wild Rose (Owners of S.S.)	[1909] 2 K. B. 46; [1910] A. C. 486	345
Matthews *v.* Cork County Council	[1910] 2 I. R. 521	384
Melville *v.* De Wolf	4 E. & B. 844	206, 630
Mercer *v.* Denne	[1905] 2 Ch. 538	659
Merryweather *v.* Nixan	8 T. R. 186; 1 Sm. L. C., 12th ed., p. 443	588
Mersey Docks *v.* Cameron	11 H. L. C. 443	139
Midland Railway Company *v.* Sharpe	[1904] A. C. 349	224
Mile End Vestry *v.* Whitby	78 L. T. 80	138
Millar *v.* Taylor	[1915] W. N. 116	679
Miller *v.* Law Accident Insurance Company	[1903] 1 K. B. 712	417
——— *v.* Waterlow & Sons	Not reported	533
Milward *v.* Caffin	2 W. Bl. 1330	774
Mitchel *v.* Reynolds	1 P. Wms. 181	561
Mitchell *v.* Croydon Justices	111 L. T. 632	52
Mitsui *v.* Mumford	[1915] 2 K. B. 27	206
Monolithic Building Company, In re	[1915] 1 Ch. 643	603
Moody *v.* Leach	44 J. P. 459	429
Moorcock, The	14 P. D. 64	679
Moore *v.* Naval Colliery Company	[1912] 1 K. B. 28	84
——— & Co. *v.* Inland Revenue Commissioners	1915 S. C. 91	270
Morgan *v.* Aylesford Licensing Justices	[1906] 1 K. B. 437	52
——— *v.* Palmer	2 B. & C. 729	113
Murray *v.* Mackenzie	L. R. 10 C. P. 625	598
Murrayfield Real Estate Company *v.* Edinburgh Magistrates	49 Sc. L. R. 148	252
Musgrove *v.* Newell	1 M. & W. 582	531

N.

		PAGE
Nash *v.* Pease	47 L. J. (Q.B.) 766	507
National Mercantile Bank, Ex parte	15 Ch. D. 42	502
Neverson *v.* Seymour	97 L. T. 788	603
Newquay Urban Council *v.* Rickeard	[1911] 2 K. B. 846	708
Nicholl *v.* Ashton	[1901] 2 K. B. 126	672, 678
Nickels *v.* London and Provincial Marine and General Insurance Company	6 Com. Cas. 15	413
Noble *v.* Ward	L. R. 2 Ex. 135	244
North-Western Rubber Company and Hüttenbach & Co., In re	[1908] 2 K. B. 907	775
Norton *v.* Gregory	73 L. T. 10	178
Norwich Corporation *v.* Norwich Electric Tramways Company	[1906] 2 K. B. 119	178

O.

Olympic Oil and Cake Company and Produce Brokers Company, In re	[1915] 1 K. B. 233	359
Olympic, The	[1913] P. 92	207, 630
Orient Company *v.* Brekke	[1913] 1 K. B. 531	359
Osmond *v.* Mutual Cycle and Manufacturing Supply Company	[1899] 2 Q. B. 488	194
Overton *v.* Hunter	1 L. T. 366	262

P.

Palace Shipping Company *v.* Caine	[1907] A. C. 386	206, 632
Panton *v.* Williams	2 Q. B. 169	530
Papworth *v.* Battersea Corporation	[1914] 2 K. B. 89; [1915] 1 K. B. 392	17
Paradine *v.* Jane	Aleyn, 26	678
Parker *v.* Great Western Railway Company	7 Man. & G. 253	113
Payne *v.* Fortescue & Sons	[1912] 3 K. B. 346	210
Perchard *v.* Heywood	8 T. R. 468	135
Perry *v.* Wright	[1908] 1 K. B. 441	97, 225
Perryman *v.* Lister	L. R. 3 Ex. 197	532
Pickard, In re	[1912] 1 K. B. 397	177, 179
Pickup's Trusts, In re	1 J. & H. 389	139
Pink *v.* Fleming	25 Q. B. D. 396	291
Polurrian Steamship Company *v.* Young	[1915] 1 K. B. 922	207, 630
Porter *v.* Freudenberg	[1915] 1 K. B. 857	361
Powell *v.* Main Colliery Company	[1900] A. C. 366	85
Pratt *v.* Cuff	Cited 4 East, 43	206, 631
Price *v.* Dyer	17 Ves. 356	245
Pritchett *v.* English and Colonial Syndicate	[1899] 2 Q. B. 428	175

R.

Radam's Microbe Killer Company *v.* Leather	[1892] 1 Q. B. 85	508
Randall *v.* Lithgow	12 Q. B. D. 525	507

		PAGE
Raven *v.* Southampton Justices	[1904] 1 K. B. 430	52
Ravenga *v.* Mackintosh	2 B. & C. 693	532
Reg. *v.* Abingdon	L. R. 5 Q. B. 406	702
—— *v.* Beckley	20 Q. B. D. 187	388
—— *v.* Bolton	1 Q. B. 66	771
—— *v.* Brodhurst	32 L. J. (M.C.) 168	392
—— *v.* Commissioners for Special Purposes of Income Tax	21 Q. B. D. 313	774
—— *v.* Dyke	8 C. & P. 261	530
—— *v.* Farler	8 C. & P. 106	530
—— *v.* Gaunt	L. R. 2 Q. B. 466	237
—— *v.* Glynne	L. R. 7 Q. B. 16	237
—— *v.* Leeds Union	L. R. 4 Q. B. 323	702
—— *v.* Machen	14 Q. B. 74	237
—— *v.* Oldham	2 Den. C. C. 472; 21 L. J. (M.C.) 134	697
—— *v.* Rogan and Elliott	1 Cox, C. C. 291	339
—— *v.* St. Leonard, Shoreditch	L. R. 1 Q. B. 21	702
—— *v.* Stubbs	25 L. J. (M.C.) 16	530
Reischer *v.* Borwick	[1894] 2 Q. B. 548	292
Rendall *v.* Hill's Dry Docks and Engineering Company	[1900] 2 Q. B. 245	85
Renshaw *v.* Queen Anne Mansions Company	[1897] 1 Q. B. 662	169
Rex *v.* Blatherwick	6 Cr. App. R. 281	530
—— *v.* Bradford	[1908] 1 K. B. 365	63, 773
—— *v.* Brown	6 Cr. App. R. 24, 147	530
—— *v.* Butcher	99 L. T. 622	744
—— *v.* Clerkenwell General Commissioners of Taxes	[1901] 2 K. B. 879	771
—— *v.* Crane	7 Cr. App. R. 113	534
—— *v.* Drinkwater	70 J. P. 1	52
—— *v.* Everest	2 Cr. App. R. 116, 130; 73 J. P. 269	530
—— *v.* Hampden	3 Howell's State Trials, 825	651
—— *v.* Kensington Income Tax Commissioners	[1913] 3 K. B. 870; [1914] 3 K. B. 429	772
—— *v.* London Gas Light Company	8 B. & C. 54	135
—— *v.* Macaskie	[1914] 3 K. B. 62	404
—— *v.* North Curry (Inhabitants)	4 B. & C. 959	702
—— *v.* O'Connor	[1913] 1 K. B. 557	394
—— *v.* Rodley	[1913] 3 K. B. 468	339
—— *v.* Sainsbury	4 T. R. 451	395
—— *v.* Shann	[1910] 2 K. B. 418	52
—— *v.* Southampton Licensing Justices	[1906] 1 K. B. 446	52
—— *v.* Tate	[1908] 2 K. B. 680	531
—— *v.* Tolhurst	[1905] 2 K. B. 478	53
—— *v.* Wilson	6 Cr. App. R. 125	530
Reynolds, Ex parte	15 Q. B. D. 169	179
Robinson *v.* Jones	4 L. R. Ir. 391	35
——— *v.* Page	3 Russ. 114	245
Rodocanachi *v.* Elliott	L. R. 9 C. P. 518	412
Rogers *v.* Ingham	3 Ch. D. 351	114
Roles *v.* Pascall & Sons	[1911] 1 K B. 982	86
Roney & Co., In re	[1914] 2 K. B. 529	195
Rotch *v.* Edie	6 T. R. 413	207
Russell *v.* Russell	14 Ch. D. 471	169

S.

		PAGE
Sadgrove *v.* Hole	[1901] 2 K. B. 1	44
St. Marylebone Assessment Committee *v.* Consolidated London Properties	[1914] A. C. 870	317
Salomon *v.* Salomon & Co.	[1897] A. C. 22	773
Salt *v.* Tomlinson	[1911] 2 K. B. 391	425
Saltpetre Case	12 Rep. 12	652
Sampson *v.* General Steam Navigation Company	(1914) W. C. & Ins. Rep. 346	212
Sanday & Co. *v.* British and Foreign Marine Insurance Company	[1915] 2 K. B. 781	361, 413
Sanderson *v.* Graves	L. R. 10 Ex. 234	245
Seldon *v.* Wilde	[1910] 2 K. B. 9; [1911] 1 K. B. 701	178
Serjeant *v.* Dale	2 Q. B. D. 558	777
Sharp *v.* McHenry	38 Ch. D. 427	600
Sheehy *v.* Great Southern and Western Railway Company	(1913) W. C. & Ins. Rep. 404	346
Shipp *v.* Frodingham Iron and Steel Company	[1913] 1 K. B. 577	225
Shoreditch Corporation *v.* Bull	90 L. T. 210	17
Simmons *v.* Heath Laundry Company	[1910] 1 K. B. 543	224
Sion College *v.* London Corporation	[1901] 1 K. B. 617	129
Sivewright *v.* Allen	[1906] 2 K. B. 81	206, 630
Skinner *v.* Northallerton County Court Judge	[1898] 2 Q. B. 680; [1909] A. C. 439	177
Smith *v.* Clinton	25 Times L. R. 34	561
—— *v.* Lion Brewery Company	[1911] A. C. 150	272
Snowdon *v.* Davis	1 Taunt. 359	115
Southam, Ex parte	L. R. 17 Eq. 578	502
Stamper *v.* Sunderland Overseers	L. R. 3 C. P. 388	317
Stannard *v.* St. Giles, Camberwell	20 Ch. D. 190	63
Star Tea Company *v.* Neal	73 J. P. 511	690
Stead *v.* Dawber	10 Ad. & E. 57	244
Steel *v.* Dartford Local Board	60 L. J. (Q.B.) 256	14
Stokes *v.* Stokes	[1911] P. 195	237
Stowell *v.* Robinson	3 Bing. N. C. 928	245
Stroms Bruks Aktie Bolag *v.* Hutchison	6 F. 486	69
Summerlee Iron Company *v.* Freeland	[1913] A. C. 221	212
Swansea Vale (Owners of S.S.) *v.* Rice	[1912] A. C. 238	346

T.

Tamplin Steamship Company *v.* Anglo-Mexican, &c., Company	[1915] 3 K. B. 668	678
Tamvaco *v.* Lucas	1 B. & S. 185	359
Tapp *v.* Jones	L. R. 10 Q. B. 591	507
Taylor *v.* Caldwell	3 B. & S. 826	678
Teutonia, The	L. R. 3 A. & E. 394	207, 630
Thompson *v.* Goold & Co.	[1910] A. C. 409	85
—— *v.* Ingham	14 Q. B. 710	776
—— *v.* Nye	16 Q. B. 175	339
—— *v.* Rowcroft	4 East, 34	206, 631
Thorley *v.* Kerry (Lord)	4 Taunt. 355	34
Throssell *v.* Marsh	53 L. T. 321	502

		PAGE
Tobin *v.* Hearn.	[1910] 2 I. R. 639	231
Tregelles *v.* Sewell	7 H. & N. 574	359
Turnbull *v.* Vickers	7 B. W. C. C. 396	85
Turner *v.* Ambler	10 Q. B. 252	531
Tuton *v.* Sanoner	3 H. & N. 280	612

U.

Usher's Wiltshire Brewery *v.* Bruce	[1915] A. C. 433	272, 377

V.

Vallambrosa Rubber Co. *v.* Inland Revenue Commissioners	1910 S. C. 519; 5 Tax Cas. 529	270
Valpy *v.* Manley	1 C. B. 594	109
Van Laun, In re	[1907] 1 K. B. 155	523
Vezey *v.* Rashleigh	[1904] 1 Ch. 634	242
Vinter *v.* Hind	10 Q. B. D. 63	428

W.

Walker *v.* South Eastern Railway Company	L. R. 5 C. P. 640	529
Waterhouse *v.* Keen	4 B. & C. 200	113
Watney, Combe, Reid & Co. *v.* Berners	[1914] 3 K. B. 288	62
Waye *v.* Thompson	15 Q. B. D. 342	429
Weare, In re	[1893] 2 Q. B. 439	761
Weaver *v.* Price	3 B. & Ad. 409	773
Webb *v.* Stenton	11 Q. B. D. 518	507
Webster *v.* Cohen Brothers	6 B. W. C. C. 92	77
West Hartlepool Corporation *v.* Durham County Council	[1907] A. C. 246	458
West Riding Justices *v.* Sheffield Corporation	8 App. Cas. 781	458
Westminster Corporation *v.* Watson	[1902] 2 K. B. 717	583
White and Hales *v.* Islington Corporation	[1909] 1 K. B. 133	315
Whitehead *v.* Reader	[1901] 2 K. B. 48	231
Wild *v.* Tucker	[1914] 3 K. B. 36	523
Wilkinson *v.* Wilkinson	L. R. 12 Eq. 604	561
Williams *v.* Pritchard	4 T. R. 2	135
Williamson *v.* Freer	L. R. 9 C. P. 393	34
Wilmott *v.* Southwell	72 J. P. 491	481
Winter *v.* Trimmer	1 W. Bl. 395	67
Wood *v.* Burgess	24 Q. B. D. 162	744
Worthington *v.* Jeffries	L. R. 10 C. P. 379	62
Wright *v.* John Bagnall & Sons	[1900] 2 Q. B. 240	85
Wynne-Finch *v.* Chaytor	[1903] 2 Ch. 475	508

Y.

Yarmouth *v.* France	19 Q. B. D. 647	377
Young *v.* Gentle	[1915] 2 K. B. 661	261

CASES

DETERMINED BY THE

KING'S BENCH DIVISION

OF THE

HIGH COURT OF JUSTICE

AND BY THE

COURT OF APPEAL

ON APPEAL THEREFROM

AND BY THE

COURT OF CRIMINAL APPEAL

AND BY THE

RAILWAY AND CANAL COMMISSION.

BRUCE *v.* McMANUS.

1915
April 13.

Cinematograph Exhibitions—Premises used for—Use in contravention of Act—Liability of Occupier—Incorporated Company—Manager of Premises—Cinematograph Act, 1909 (9 *Edw.* 7, *c.* 30), *s.* 3.

By s. 3 of the Cinematograph Act, 1909, "If the occupier of any premises" used for cinematograph exhibitions "allows those premises to be used in contravention of the provisions of this Act" he is liable to a penalty:—

Held, that where the owner of such premises employs a servant to manage them on his behalf and subject to his control the owner and not the manager is the occupier for the purposes of that section.

Case stated by justices of Birmingham.

The appellant, Henry Bruce, was summoned on an information under s. 3 of the Cinematograph Act, 1909, charging that he

1915

BRUCE v. MCMANUS.

being the occupier of certain premises known as the Picture House in High Street, Birmingham, did on June 20, 1914, and daily thereafter down to August 12, 1914, allow the premises to be used in contravention of the provisions of the said Act in that he allowed them to be used for cinematograph exhibitions (1) without having first obtained a licence for some person so to use them.

At the hearing the following facts were proved or admitted:—

The owners of the Picture House were the London and Provincial Electric Theatres, Limited, and cinematograph exhibitions were given therein during the period mentioned in the information. The name of the said company appeared on the poor rate book as that of the occupiers of the Picture House.

On April 5, 1914, a licence under the said Act was granted for twelve months to one W. A. Rankin in respect of the said Picture House. By the terms of the licence the licensee was required inter alia to observe and keep the regulations annexed thereto. Amongst those regulations were the following:—

7. "The licensee shall maintain and keep good order and decent behaviour in the premises during the hours of public performance."

58. "The licensee, that is the person in whose name the licence is granted, shall be solely and entirely responsible for the carrying out of the above regulations, and for the safety of the public and employees in the event of fire or panic."

Rankin was manager for the company of the cinematograph exhibitions held at the Picture House until June 20, 1914. Rankin, as such manager, did not reside at the Picture House, but resided in Birmingham and attended daily at the Picture House and personally supervised the same.

On or about June 20, 1914, the appellant, who was superintendent of electric theatre decorations for the company and was at the time managing an electric theatre in London belonging to the company, on the instructions of the company was transferred to the said Picture House, and undertook the management of it. On or about the said June 20 Rankin, who was also a servant of the company, was removed from the Picture House by

(1) It was assumed that for these exhibitions inflammable films were used.

1915

BRUCE v. MCMANUS.

the company. The appellant from June 20 attended at the Picture House and continued the management thereof without having previously obtained a transfer of the licence, and the appellant continued so to act up to August 12.

On August 5, 1914, notices were served for the transfer at the next special sessions to the appellant of the aforesaid licence in respect of the said premises, and at such special sessions the licence was in due course transferred.

It was contended on behalf of the appellant that he was not the occupier of the premises and that the company were the occupiers. It was also contended that the premises had not been used in contravention of the Act, as there was a licence in existence in respect of them.

On behalf of the respondent it was contended that the appellant as being the person required to be in personal attendance at the premises was the occupier, and that the licence granted to Rankin lapsed and became void on his removal from the premises.

The justices convicted the appellant subject to a case for the opinion of the Court.

H. H. Joy, for the appellant. There are two objections to this conviction: first, that no offence had been committed by any one, and secondly, that if such offence had been committed it was not so committed by the appellant. The offence charged is that the premises were used " in contravention of the provisions of this Act " by reason of their being used for cinematograph performances at a time when they were not licensed as required by s. 1. (1) The contention of the prosecution was that upon

(1) By the Cinematograph Act, 1909, s. 1, " An exhibition of pictures or other optical effects by means of a cinematograph . . . . for the purposes of which inflammable films are used, shall not be given . . . . elsewhere than in premises licensed for the purpose in accordance with the provisions of this Act."

Sect. 2, sub-s. 1: " A county council may grant licences to such persons as they think fit to use the premises specified in the licence for the purposes aforesaid."

Sub-s. 3: " A county council may transfer any licence granted by them to such other person as they think fit."

Sect. 3: " If the owner of a cinematograph or other apparatus uses the apparatus or allows it to be used, or if the occupier of any premises

1915

BRUCE v. MCMANUS.

Rankin leaving Birmingham his licence lapsed, and thereupon the premises became unlicensed. But there is nothing in the Act to show that a licence is only to enure so long as the grantee resides upon the spot. The object of the Act is to secure that the premises shall be licensed, not a person, although necessarily the licence must be granted to some person in respect of them. Sect. 2, sub-s. 1, which says that "A county council may grant licences to such persons as they think fit to use the premises," means nothing more than that the council may require the licensees to be substantial persons who will be answerable to them for the proper use of the premises. In the present case the owners of the premises were a corporate body and it may have been thought that there was a difficulty in granting a licence to such a body, and therefore the council granted it to the appellant on the company's behalf, as was done in the case of *London County Council* v. *Bermondsey Bioscope Co.* (1) If the contention of the other side were right the exhibitions would have to cease whenever the licensee was temporarily absent from illness. It cannot be said that the licence had lapsed, for it was subsequently transferred to the appellant, which imports that it was alive when the offence was alleged to be committed. But assuming that an offence was committed, it was not by the appellant. The offence is charged against the occupier and consists in his allowing the premises to be used in a particular way. The appellant was not the occupier, for he was only a servant, and for the same reason he had no power to give or refuse his assent to the particular user of the premises. The occupiers of the premises were the company who owned them, and whose name was on the rate book as that of the occupiers. In the absence of any definition of the word "occupier" in the Act, it must be understood in its ordinary sense.

Birkett, for the respondent. The conviction was right. The premises were unlicensed at the material dates, for Rankin's licence was no longer operative. The object of the Cinematograph Act is to secure the public from danger of fire, and with

allows those premises to be used, in contravention of the provisions of this Act . . . . he shall be liable on summary conviction to a fine not exceeding 20*l.*"

(1) [1911] 1 K. B. 445.

that end in view the county council are empowered by s. 2 to grant licences to such persons as they may think likely to exercise care in the conduct of the exhibitions and management of the premises. It is by no means immaterial whether the licensee is one person or another, as was suggested by the appellant. The selection of a careful person as the licensee would be futile if the licensee having got his licence might leave the premises permanently in the charge of another person. The intention of the section is that the licensee shall be ordinarily in attendance at the premises. It may be that a casual and temporary absence would not avoid the licence, but a permanent removal from the place must do so. Regulations 7 and 58 of the regulations annexed to the licence point to this conclusion. If the other side is right, then if the council, having refused a licence to A. on the ground of his unfitness, were to grant a licence to B. as being a fit person, B. might leave the premises permanently in the charge of A., and no offence would be committed in the user of the premises under those circumstances notwithstanding that the effect would be to nullify the discretion of the council. The contention of the appellant gives no meaning to the words "to such persons as they think fit." Secondly, the appellant was the occupier and as such allowed the premises to be used. The only person who can lawfully "use" the premises is by s. 2 declared to be the licensee. He therefore is the only person who can allow them to be used within s. 3. The intention to be gathered from the two sections when read together is that the licensee under s. 2 and the occupier under s. 3 are to be the same person; the council are only to grant the licence to the person who is in fact in occupation. The mere fact that the company were entered on the rate book as the occupiers does not show that they were the occupiers for the purposes of this Act. The word "occupier" must always be construed with reference to the object of the particular Act in which it occurs.

LORD READING C.J. This appeal raises a question as to the meaning of the word "occupier" in s. 3 of the Cinematograph Act, 1909. The London and Provincial Electric Theatres, Limited, are the owners of a number of theatres where cinematograph

1915

BRUCE v. MCMANUS.

Lord Reading C.J.

exhibitions are given, and they employ a number of persons to conduct these exhibitions on their behalf. Under the Cinematograph Act, 1909, a licence is required for the purpose of exhibitions in which inflammable films are to be used, and a licence was granted to one Rankin on behalf of this company in respect of a particular theatre in High Street, Birmingham. Rankin shortly after he had obtained the licence and while it was still in force left Birmingham to take up duties elsewhere. Thereupon Mr. Bruce, the present appellant, was sent by the company to take charge of and manage this particular theatre, always under the control and direction of the company. In so managing it he was to act as the servant of the company and carry out their instructions. It was not until after he had been there for a few weeks that the licence which had been granted to Rankin was transferred to the appellant, and during that interval he was admittedly not licensed. In respect of that interval a summons was taken out against him for having contravened the statute in that he being the occupier of the premises had allowed them to be used for cinematograph exhibitions without having first obtained a licence. The justices convicted, and one of the questions raised upon the appeal is whether, assuming that the premises were used in contravention of the Act, the appellant was the occupier and therefore responsible for such user. It was argued that for the purposes of this Act the occupier is the licence holder. In my judgment that is a fallacy. Sect. 2 says that the "county council may grant licences to such persons as they think fit to use the premises"; and then s. 3 provides the penalties to be imposed if the owner of the cinematograph apparatus allows it to be used, or if the occupier of the premises allows them to be used, in contravention of the Act. In this case there can be no doubt that the company is the occupier of these premises. Bruce had not the control or possession of the premises. He was there, in the same manner as any other employee of the company, to obey the company's orders and directions, except that he was no doubt in command over the rest of the employees subject always to the company. In my opinion he was not the occupier of the premises and therefore had not committed the offence with which

he was charged. I see no difficulty, as a matter of law, in a licence being granted directly to a company; a company is a person. Though it may be that the justices prefer to grant the licence to some individual person who is physically present in the area over which they are exercising jurisdiction, instead of to a corporate body, that is a matter entirely for the justices. But if they grant the licence to an individual who holds it on behalf of the company, it does not follow that he is necessarily the occupier of the premises. In the present case I think it is clear that the company was the occupier and nobody else. The further point taken on behalf of the appellant, that he did not allow the premises to be used, really involves the same question. He could only allow the premises to be used if he was the occupier. The appeal must be allowed.

AVORY J. I am of the same opinion. If any mischief results from this decision it must be attributed to the way in which the Act is drawn. But I am not satisfied that any mischief will result. Two points have been taken on behalf of the appellant:—first, that the evidence does not disclose any offence committed by anybody, and secondly, that if it does disclose an offence committed by somebody, it was not committed by Bruce. I think it unnecessary to express any opinion whether these facts do disclose an offence at all.

The appellant is summoned for that he being then the occupier of the premises allowed them to be used in contravention of the Act. It is essential to the maintenance of the conviction to establish that he was the occupier of the premises within the meaning of s. 3. I am clearly of opinion that he was not. The difficulty arises from the manner in which the Act is drawn. In s. 1 the general scheme of the Act is that exhibitions of cinematograph pictures for which inflammable films are used shall not be given elsewhere than in premises licensed for the purpose. That section contemplates that the premises themselves are to be licensed. Then s. 2 provides that the county council may grant licences to such persons as they think fit to use the premises specified in the licence for the purposes aforesaid, and here the council acting under that

1915

BRUCE v. MCMANUS.

AVORY J.

section granted a licence to a person named Rankin, whom they thought a fit person. Then comes s. 3, which creates the offence, and I am not at all satisfied that the Legislature in that section did not deliberately alter their language so as to make it more comprehensive than it would have been if the offence had been limited to the person holding the licence. The section provides that two persons may be guilty of offences; first the owner of the apparatus if he allows it to be used in contravention of the provisions of the Act, and secondly the occupier of the premises if he allows the premises to be used in contravention of the provisions of the Act. I think it was intended there to hit the occupier of the premises quite apart from the question whether he is the holder of the licence or not. In no sense can it be said that the appellant here was the occupier. There being no definition of that term in the Act, it must be construed in its ordinary legal sense, that of the person who has the control of the premises. The appellant had not the control of them, he was only a servant; and I agree with my Lord that the occupier of the premises was the company. Therefore the conviction cannot be maintained.

LUSH J. I am of the same opinion. Unless the appellant was the occupier of these premises, and unless as such occupier he allowed the premises to be used in contravention of the Act, the conviction cannot stand. Was he the occupier? It seems to me that the word "occupier" is used in this Act in its ordinary sense. For instance s. 7, sub-s. 2, speaks of the occupier of the premises in a context which shows clearly that the person indicated by those words is the person who is in legal occupation and in control of the premises. The appellant had not the control of these premises. He may have had the control of the exhibitions, but the persons controlling and occupying the premises were his employers, the company. Secondly it seems to me clear that the appellant, who was only the servant of the occupiers, cannot be said to have allowed the premises to be used. The persons who allowed them to be used were the company to whom the premises belonged. That is sufficient to dispose of the case. But I am far from suggesting that if the proceedings

had been taken against the company any offence could have been established upon the evidence. There was certainly strong ground for contending that no offence had been committed because the exhibitions were not given at premises which were not duly licensed. But it is unnecessary to decide that point. I agree that the conviction must be quashed.

1915

BRUCE v. MCMANUS.

Lush J.

Appeal allowed.

Solicitors for appellant: *Ansell & Sherwin, Birmingham.*
Solicitor for respondent: *J. Ernest Hill, Birmingham.*

J. F. C.

LEAVETT *v.* CLARK.

1915

May 7.

Fishery—Stealing Fish from—Whether Winkles are Fish—Larceny Act, 1861 (24 & 25 *Vict. c.* 96), *s.* 24.

By s. 24 of the Larceny Act, 1861, "Whosoever shall unlawfully and wilfully take . . . . any fish in any water . . . . in which there shall be any private right of fishery" shall on conviction be liable to a certain penalty, "provided that nothing hereinbefore contained shall extend to any person angling" between certain hours.

A corporation had a right of several fishery in a portion of a tidal river. The appellant, without any licence in that behalf from the corporation, when the tide was out collected winkles from small pools left by the receding tide in the bed of the river at a spot within the limits of the fishery:—

Held, that winkles, although incapable of being taken by angling, were "fish," and that there was evidence upon which the justices might find that the pools from which they were taken were "water" within the meaning of the section.

CASE stated by justices of Maldon.

The appellant Harry Leavett was summoned upon an information under s. 24 of the Larceny Act, 1861, charging him with having unlawfully taken otherwise than by angling certain fish, to wit, winkles, then being in certain water, to wit, the river Blackwater, wherein the corporation of Maldon had a private right of fishery.

1915

LEAVETT v. CLARK.

At the hearing of the information the following facts were proved :—

On December 2, 1913, the appellant with four other men was found picking up winkles by the respondent, who is the fishery bailiff to the Maldon Corporation. The place at which the appellant was picking up winkles is known as Goldhanger Spit, which is situate in a creek of the tidal river known as the Blackwater. By various Royal charters, the first of which was granted in 1155, the Maldon Corporation enjoy and exercise an exclusive and several fishery of the river Blackwater within certain limits, and Goldhanger Spit is situate within the limits of the said fishery. The place in question was a mud flat in the bed of the river about halfway between high and low water marks, it being practically low water at the time the appellant was found there. The flat slopes gently down towards the channel of the river and the receding tide leaves rills or small creeks by means of which the water left by the tide drains into the river. The receding tide also leaves pools of water or "panholes" as they are locally called. Winkles are found in the rills and panholes referred to and also in and under the weeds and on the mud. The appellant at the time and place charged took winkles from the water in the rills and panholes as well as from under the weeds and from the mud.

It was contended for the appellant that a winkle, especially in view of the fact that it cannot be taken by angling, is not a fish within the meaning of the section, and also that the rills and panholes from which the appellant took them were not water in which the corporation had a private right of fishery. The justices held that winkles were fish and that the rills and panholes from which some of the winkles were taken were water in which the corporation of Maldon had a private right of fishery, and they convicted the appellant.

Ganz (*E. H. Tindal Atkinson* with him), for the appellant. Winkles are not fish within the meaning of the section. The proviso that the enacting part shall not apply to persons angling at certain hours shows that it was meant to be restricted to fish of the kind which are capable of being taken by angling, which

winkles are not. It is true that in *Caygill* v. *Thwaite* (1) crayfish were held to be fish within the section. But that case was wrongly decided. Mathew J. said that it was "difficult to give any definite reason except that crayfish are fish"—a reason which seems to suggest a mistaken view of the etymology of the word crayfish. It is generally understood to be a corruption of the French "écrevisse," the second syllable of the English form having nothing to do with fish. In scientific language fish are limited to vertebrate animals having gills throughout the whole of their life, and do not include crustaceans or molluscs (see the Oxford English Dictionary), and it is in that sense that the Legislature prima facie uses the term. In the Larceny Act it deals with oysters separately in s. 26. When it intends to include molluscs and crustaceans under the head of fish it says so. Thus in the Thames Conservancy Act, 1864 (27 & 28 Vict. c. 113), s. 3, "The term 'fish' includes oysters and shell fish." In the Sea Fisheries Regulation Act, 1888 (51 & 52 Vict. c. 54), s. 14, "The expression 'sea fish' . . . . shall mean fish of all kinds found in the sea, and shall *also* include lobsters, crabs, shrimps, prawns, oysters, mussels, cockles and other kinds of crustaceans and shell fish." Secondly, these particular winkles were not taken from "water" within the meaning of s. 24. The object of the section was to protect the right of fishing in the flowing water of the river, and the expression "water" was not meant to include puddles left on the mud flat when the tide was out.

C. E. Jones, for the respondent. The word "fish" in s. 24 is used in its popular sense, in which it includes all animals living in the water. The enacting part of the section deals with all modes of taking fish, and there is nothing in the proviso which necessarily restricts its general application. This was the view taken by the Court in *Caygill* v. *Thwaite*. (1) That case is a direct authority in the respondent's favour. The fact that the Legislature in other Acts has ex abundanti cautela said that the term "fish" shall include shell fish does not show that absence of that precaution would have prevented the term from having precisely the same meaning. The fact that the amount of the

(1) (1885) 49 J. P. 614.

1915

LEAVETT v. CLARK.

water in the rills and pools from which some of the winkles were taken was small does not make it any the less water.

Ganz in reply.

LORD READING C.J. In this case as originally stated by the justices there was no finding that any of the winkles found in the appellant's possession were taken by him from any water in which the corporation of Maldon had a private right of fishery, and the case was accordingly remitted to them to ascertain the facts upon that point. They now state that some of the winkles were taken from water in which the corporation had a private right of fishery, the evidence being that they were taken out of rills and panholes left by the receding tide. The question is whether under those circumstances the conviction was right. The first point is whether winkles are fish within the meaning of the section. I confess that apart from authority I should be inclined to hold that they were not. But the matter is not open to us. In *Caygill* v. *Thwaite* (1) it was held that a crayfish was a fish within s. 24. It may be that the reason given by Mathew J. for so holding was not very satisfactory, but the decision is binding upon us. If the section applies to crayfish it must equally apply to winkles. We must therefore follow that decision. We cannot read the general words in the first part of the section as limited by the reference to angling in the proviso. There remains the question whether the rills and panholes were "water" within the statute. It is a question of fact for the justices, and in view of their finding we cannot say that these winkles were not taken from water. The conviction must be affirmed.

AVORY J. I reluctantly agree, and solely upon the ground that for thirty years the law has been assumed to be as it was laid down in *Caygill* v. *Thwaite*. (1) That decision this Court ought not now to overrule. But for that decision I should have held that winkles picked up from a mud flat were not fish taken from water within s. 24 of the Larceny Act, 1861.

LUSH J. I agree. The justices have found that winkles are fish. We are asked to reverse that finding and to say that shell

(1) 49 J. P. 614.

1915

LEAVETT v. CLARK.

Lush J.

fish cannot be fish within the meaning of s. 24. Personally I cannot see why shell fish should not be regarded as fish. The reference to angling in the proviso cannot limit the meaning of the general words in the enacting part. With regard to the question whether the winkles were taken "in any water" the justices have found as a fact that they were.

Appeal dismissed.

Solicitors for appellant: *Doyle, Devonshire & Co., for Jones & Son, Colchester.*

Solicitors for respondent: *Beaumont, Son & Rigden, for F. H. Bright, Maldon.*

J. F. C.

THOMPSON *v.* BRADFORD CORPORATION AND TINSLEY.

1915

April 30.

Local Government—Widening of Street—Highway Authority—Post Office—Removal of Telegraph Pole—Hole caused by Removal improperly filled in—Liability of Highway Authority and Post Office—Telegraph Act, 1863 (26 & 27 *Vict. c.* 112), *s.* 15—*Telegraph Act*, 1868 (31 & 32 *Vict. c.* 110), *s.* 2—*Bradford Corporation Act*, 1910 (10 *Edw.* 7 & 1 *Geo.* 5, *c. cxvii.*), *s.* 25.

A highway which was vested in the Bradford Corporation and over which very heavy traffic passed was at a certain point very narrow. The corporation under powers conferred upon them by a local Act determined to widen the highway by setting back the kerbstone and throwing the causeway into the road. On the edge of the causeway nearest the road there was a telegraph pole, which it was necessary to remove, and the corporation wrote to the Post Office authorities asking them to set back the pole to the improved street line. The Post Office accordingly had the pole removed and the hole filled in. Shortly afterwards the corporation threw the road open for traffic. A few days later a steam wagon belonging to the plaintiff was passing along the highway when one of its wheels sank into the hole and the wagon was considerably damaged. In an action brought by the plaintiff against the corporation and the Post Office authorities to recover damages for injury to his wagon caused by the negligence of the defendants:—

Held, that the defendants were liable, the corporation upon the ground that they were altering the character of part of an old road (i.e., in effect

1915

THOMPSON v. BRADFORD CORPORATION AND TINSLEY.

making a new road), and their duty was to so make it that when they threw it open for public use it should be reasonably safe for the purposes for which it was intended to be used; the Post Office authorities upon the ground that having done, perhaps voluntarily, a piece of work, they did it negligently.

McClelland v. *Manchester Corporation* [1912] 1 K. B. 118 and *Hill* v. *Tottenham Urban Council* (1898) 15 Times L. R. 53 followed.

Steel v. *Dartford Local Board* (1891) 60 L. J. (Q.B.) 256 distinguished.

Held, further, that the Telegraph Act, 1863, did not take away any responsibility which the corporation might be under independently of it.

APPEAL by the defendants from the judgment of the judge of the Bradford County Court.

The action was brought to recover damages sustained by the plaintiff by reason of the negligence of the defendants in connection with the widening and alteration of a road situate in the city of Bradford and known as Horton Bank and the removal of a telegraph pole in the road, in consequence whereof a steam wagon belonging to the plaintiff while being properly driven by one of his servants along the road on April 10, 1914, fell into an excavation in the road and was seriously damaged.

The particulars of negligence relied upon by the plaintiff were that the defendants having dug a large hole or trench in the road failed and neglected to so fill it up and repair the road as to make it safe and sufficient for the proper and accustomed user thereof by vehicular traffic or to give proper or any warning to the public (including the driver of the plaintiff's wagon) that the road was unsafe or unfit for the passage thereon of the traffic, and the defendants failed to properly supervise or carry out the alterations and repairs in and upon the road.

The facts were as follows. Horton Bank is one of the main thoroughfares between Bradford and Halifax over which very heavy traffic passes and is vested in the defendant corporation. At the point where the accident happened it was very narrow, and the corporation, under powers conferred upon them by s. 25 of the Bradford Corporation Act, 1910 (1), determined to widen

(1) Bradford Corporation Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. cxvii.), s. 25: "Subject to the provisions of this Act the corporation upon the lands in that behalf delineated on the deposited plans and described in the deposited book of reference and in the line and situation and according to the levels shown on the deposited plans and sections may make

it by setting back the kerbstone and throwing the causeway into the road. On the edge of the causeway nearest the road there was a telegraph pole which it was necessary to remove, and the corporation wrote to the defendant Mr. Tinsley on March 5, 1914, saying that the works in connection with the improvement were being carried out under powers conferred upon the Bradford Corporation by the Act of 1910 and asking him to set back the pole to the improved street line. Mr. Tinsley was one of the principal officers in the Post Office Engineering Department, and it was admitted that he was the proper person to be sued if the plaintiff had a cause of action. Mr. Tinsley had the pole removed on April 3, and then had the hole filled in. On April 6 the road was opened for traffic by the corporation, and on April 10, about 2.15 P.M., the wheel of the plaintiff's wagon sank into the hole, and the wagon was considerably damaged. The wagon was driven by steam and was of a type in common use in Bradford and the neighbourhood. It weighed 4 tons and 19 cwts. and was loaded with stones weighing 4 tons. No warning was given that the road was unsafe, and in the view of the county court judge it was not known to be unsafe. Mr. Tinsley's men having dug the pole out of the hole proceeded to fill it in, finishing the job about 5.30 P.M. on April 3. When they had finished it they put back the barriers and lamps which the corporation had put round the pole, and from that time onwards Mr. Tinsley had nothing further to do with the hole, and the corporation did nothing further to it. Workmen employed by the Post Office on the job gave evidence to the effect that the hole was filled in as they had done on previous occasions in other places, and was well rammed. The hind wheel of the wagon was agreed to be about 39 inches diameter, with a tread 10 inches broad, yet with this very large bearing surface the wheel sank practically instantaneously down nearly to the axle, and the county court judge arrived at the conclusion that whatever the usual practice may

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and maintain wholly in the city the following street works (that is to say):—

"Work No. 13. A widening and improvement of High Street Great Horton on the northern side thereof between Holly Bank Road and a point about fifty-four yards westward of that road."

1915

THOMPSON v. BRADFORD CORPORATION AND TINSLEY.

have been in filling up holes, the hole on this occasion had not been filled and rammed in such a way as to carry vehicles like the plaintiff's wagon in safety. On April 6, 1914, when the corporation took down the barriers and permitted the traffic to pass along the road, the surface of the road appeared to be in good order, and there was nothing in the appearance of the road to indicate that the hole had not been properly filled in.

The county court judge gave judgment against both defendants, against the defendant Tinsley as the representative of the Post Office upon the ground that as the Post Office authorities had opened a hole in the ground which they knew was going to form part of a main road and had filled it in in a way which was not sufficient to carry the usual traffic there was negligence on their part; and against the corporation upon the ground that it was their duty as the highway authority to see for themselves that the hole was or had been filled in so as to make it safe for the normal traffic, and they had neglected that duty.

The defendants appealed.

Macmorran, K.C., and *T. D. Wright*, for the defendants the Bradford Corporation. The corporation required the Post Office to remove the pole under s. 15 of the Telegraph Act, 1863, as amended by s. 2 of the Telegraph Act, 1868, by which the Act of 1863 is made applicable to the Postmaster-General. The corporation did not take the matter out of the hands of the Post Office as they might have done under s. 19 of the Act of 1863, and the Post Office did all the work. By s. 18 of the Act of 1863 it is the duty of the Post Office to restore the road, and by s. 42 the Post Office is responsible for all accidents and injuries happening through its default and is to save harmless all bodies having control of the streets in respect of such accidents and injuries. *Cressy* v. *South Metropolitan Gas Co.* (1) and *Brame* v. *Commercial Gas Co.* (2) bear upon the present case to some extent as they illustrate the respective liabilities of gas companies and local authorities. There was no obligation upon the Bradford Corporation to supervise the work. If it were merely a question of failing to keep the

(1) (1906) 94 L. T. 790. (2) [1914] 3 K. B. 1181.

road in repair, it is clear that the corporation would not be liable. But the question is whose duty was it to fill in the hole? Sect. 18 of the Telegraph Act, 1863, places the duty wholly upon the Post Office. As the corporation did not take over the work under s. 19 they have no responsibility in the matter. If the corporation had under s. 19 taken the work out of the hands of the Post Office they would undoubtedly have been liable for negligence. If a corporation are both a sewer and a highway authority, they may be liable as the sewer authority though not as the highway authority: *Papworth* v. *Battersea Corporation*.(1) *Steel* v. *Dartford Local Board* (2) shows that the corporation of Bradford is not liable. The Act of 1863 places no obligation upon the corporation to do anything except to give the notice to the Post Office. The decision in *Shoreditch Corporation* v. *Bull* (3) is not in point. In that case the local authority had interfered with the road and had negligently omitted to restore it. But the corporation of Bradford have done nothing. *McClelland* v. *Manchester Corporation* (4) is distinguishable upon the same ground. There is no finding by the county court judge that the corporation accepted the duty of superintendence and performed it negligently, and there was no duty in law upon the corporation to exercise supervision over the work.

H. L. Murphy, for the defendant Tinsley. There was no duty upon the Post Office authorities to make that part of the road from which they removed their pole suitable for heavy traffic. By s. 29 of the Bradford Corporation Act, 1910, ss. 40 and 41 of the Bradford Corporation Act, 1902 (2 Edw. 7, c. cxiii.), "shall extend and apply to and in relation to the tramways and street works by this Act authorized as if those enactments were in this Act re-enacted with special reference thereto," and s. 41 of the Act of 1902 provides that "the corporation shall not raise sink or otherwise alter the position of any pipe, tube, wire cable conductor or other apparatus belonging to or used by His Majesty's Postmaster-General except in accordance with and subject to the provisions of the Telegraph Act, 1878."

(1) [1914] 2 K. B. 89; [1915] 1 K. B. 392.
(2) 60 L. J. (Q.B.) 256.
(3) (1904) 90 L. T. 210.
(4) [1912] 1 K. B. 118.

1915

THOMPSON v. BRADFORD CORPORATION AND TINSLEY.

Sect. 7 of the Telegraph Act, 1878, applies to the present case. It provides that where any work proposed to be done in the execution of an undertaking authorized by statute involves an alteration in any telegraphic line of the Postmaster-General the undertakers shall give not less than seven nor more than fourteen days' previous notice to the Postmaster-General, who may, before the expiration of seven days after the notice is given to him, give a counter-notice to the undertakers requiring them to make the alterations under his supervision. That section shows that the sections in the Telegraph Act, 1863, which have been referred to on behalf of the corporation do not apply to the present case. They only apply where the work is undertaken and initiated by the Post Office for its own purposes. The Post Office only undertook to set back the pole and reset the earth, not to make a portion of a road. The fact that they replaced the lamps where the hole had been made clearly indicated that the Post Office authorities did not purport to have made the hole safe.

Waugh, K.C., and *R. Watson*, for the plaintiff. *Steel* v. *Dartford Local Board* (1) is distinguishable. In that case the Court was dealing with an old highway. In the present case a new highway was thrown open and there was a duty upon the Bradford Corporation to see that it was not a trap. The effect of s. 149 of the Public Health Act, 1875 (38 & 39 Vict. c. 55), is that the highway is vested in the defendants the corporation of Bradford, and there is therefore a duty upon them to see that it is reasonably fit for traffic. *Hill* v. *Tottenham Urban Council* (2) is directly in point. The corporation was guilty of misfeasance: *Shoreditch Corporation* v. *Bull* (3); *McClelland* v. *Manchester Corporation*. (4) The road was apparently sound, but in fact it was not. There was evidence upon which the county court judge could find negligence on the part of the corporation.

Macmorran, K.C., in reply. The Telegraph Act, 1863, is preserved by the Telegraph Act, 1878, and the Act of 1863 casts a statutory obligation upon the Post Office authorities to put the road into a proper state of repair. Sect. 42 of the Act of 1863 makes the Post Office liable for all accidents, and there was no

(1) 60 L. J. (Q.B.) 256.
(2) 15 Times L. R. 53.
(3) 90 L. T. 210.
(4) [1912] 1 K. B. 118.

obligation upon the corporation to guarantee that the Post Office would do the work properly, and upon that ground *Hill* v. *Tottenham Urban Council* (1) is distinguishable. The present case is governed by *Steel* v. *Dartford Local Board*. (2)

BAILHACHE J. In this case there are two appeals in an action brought by the plaintiff Thompson against the defendants the corporation of Bradford and William Tinsley. Mr. Tinsley represented the Postmaster-General. The action by the plaintiff is, in substance, against the corporation of Bradford as road authority, and against the Postmaster-General as having done certain work in removing telegraph poles. The action was for negligence, in that when the plaintiff's steam wagon was being driven along a road which had lately been opened by the corporation of Bradford to the public the wheel of his wagon sank into a hole in the road, and the wagon sustained damage. The county court judge gave judgment against both the defendants for the damage done, and both defendants now appeal on the ground that there was no evidence of negligence in regard to either of them upon which the judgment of the county court judge can be sustained.

The very short facts of the case are not at all in dispute. [Having stated them the learned judge continued :]

Now, the first question is whether the Bradford Corporation are liable for that accident. Mr. Macmorran on their behalf has reminded us that for mere nonfeasance the road authority are not responsible, and he has cited one or two authorities to that effect. We do not desire to say a word against that principle, which is far too well established to be shaken even if we desired to shake it now. He has further called our attention to the Telegraph Act, 1863, and in particular to ss. 15 to 19 of that Act, and to s. 42. Under s. 15 of that Act the duty is cast upon the company. In those days the telegraphs in the country and the telegraph communications were in the hands of companies, but a few years afterwards they became vested in the Postmaster-General. We may conveniently treat the Act of 1863 as though the telegraphs were at that time vested in the Postmaster-General, and say that the duty is on the Post

(1) 15 Times L. R. 53. (2) 60 L. J. (Q.B.) 256.

1915

THOMPSON v. BRADFORD CORPORATION AND TINSLEY.

Bailhache J.

Office authorities by s. 15 of the Act to remove poles of this description when requested to do so by the local authority. Sect. 17 of the Act gave the local authority power to supervise the work if they pleased; and s. 18 provided that the Postmaster-General if he did the work was to restore the street and keep it in repair—that is the part that had been put out of repair by the work done by him—for a period of six months. By s. 19 the local authority were empowered to do the work themselves if they chose; and by s. 42 the Postmaster-General was to be liable for accidents which were caused if he did the work which the local authority requested him to do, and an accident resulted from the fact that the work was done by him in a negligent way, and Mr. Macmorran has upon those sections based his argument that whereas in the present case the Postmaster-General did the work at the request of the local authority the Act of 1863 imposes upon him, and upon him alone, the duty of doing the work carefully, and throws upon him, and upon him alone, the responsibility for any injury and expense that may result from the work being improperly done. I do not think that that is the result of the statute. It is quite clear that the statute does impose those liabilities on the Postmaster-General, but I do not think that it imposes them upon him to the exclusion of any liability any other authority may be under for other reasons in respect of the work which has been done. In truth, I do not think that the Act of 1863 has very much to do with this case at all. I think that this case, so far as the Postmaster-General goes, may be treated as the case of a person having done work by request, which possibly he need not have done, but having done it and done it negligently, he is liable, even if it was work he need not have undertaken. But to go back to the corporation of Bradford, I do not think that the Act of 1863, even if that be the Act under which this work was done,—and there is some doubt whether the work was done under that Act or under the Telegraph Act, 1878,—but be that as it may I do not think that the Act of 1863 disposes of or takes away any responsibility which the corporation might have come under independently of it. Bearing in mind their non-liability for nonfeasance, did the corporation of Bradford come under any liability in respect of this pole? I

think they did for the reason that they were making a new road. I quite agree that the pavement and the roadway together form one highway, but when I speak of a new road I mean that the corporation were turning what had been a footpath into a roadway, and in my judgment that is equivalent to making a new road. They were altering the character of part of an old road, and that is in effect making a new road.

What is the duty of a highway authority which makes a new road? The duty is to make it so that when the authority throws the road open to the public for public use the road shall be reasonably safe for the purposes for which it is intended to be used. In this particular case very heavy traffic passes over this road, and in my judgment it was the duty of the highway authority who were making this road and who were intending to throw it open for the traffic to see that it was reasonably fit for that purpose. It is true that this particular piece of road was unfit by reason of what had been done by the Post Office authorities, but that does not seem to me to matter, because I think it is no answer when a highway authority throws open a new road and that road is in fact unfit to say: "Well, the unfitness arises because that part of the road which was unfit was not rendered unfit by anything we did, but was rendered unfit by reason of something which some one else did at our request." I do not think that is any answer at all, and in my judgment the corporation are liable on the simple ground that in altering the character of this road—turning it from a footpath into a roadway for heavy traffic—there was an obligation upon them to see that when they opened it to the public it was fit for the traffic and purposes for which it was intended to be used. I think that is in accordance with the judgment of Lush J. in *McClelland* v. *Manchester Corporation* (1) and with the judgment of Bruce J. in the well-known case of *Hill* v. *Tottenham Urban Council* (2), and I think that the fact that it was a new road—a road devoted to a new purpose as distinguished from an old highway—distinguishes this case from *Steel* v. *Dartford Local Board.* (3) For these reasons I hold that the corporation of Bradford were

(1) [1912] 1 K. B. 118. (2) 15 Times L. R. 53.
(3) 60 L. J. (Q.B.) 256.

1915

THOMPSON v. BRADFORD CORPORATION AND TINSLEY.

Bailhache J.

liable. The Post Office authorities seem to me to be liable on the very simple ground that having done, perhaps voluntarily, a piece of work which they may not perhaps have been compellable to do, they did it negligently. If a person does a piece of work negligently, although he need not have done it at all, he is liable for the consequences of his negligence. If he undertakes to do it he must do it with reasonable care, and the Post Office authorities appear to have neglected their duty in that respect, and on that simple ground, apart from statute, it seems to me they are liable. I think the learned county court judge was quite right in giving judgment against both the Bradford Corporation and the Post Office authorities in the person of Mr. Tinsley, and this appeal must be dismissed.

SHEARMAN J. I agree, and have nothing to add.

Appeal dismissed.

Solicitor for plaintiff: *T. B. Brook, for A. V. Hammond, Bradford.*

Solicitor for defendant Tinsley: *Solicitor to Post Office.*

Solicitor for defendants the Bradford Corporation: *Cann & Sons, for F. Stevens, Town Clerk, Bradford.*

J. E. A.

ATKINSON *v.* MORGAN.

1915
May 6.

Coal Mine—Ventilation—Manager—Liability of—Coal Mines Act, 1911 (1 & 2 *Geo.* 5, *c.* 50), *ss.* 29, 75, 101.

By s. 29 of the Coal Mines Act, 1911, "An adequate amount of ventilation shall be constantly produced in every mine to dilute and render harmless inflammable and noxious gases to such an extent that all shafts, roads, levels, stables, and workings of the mine shall be in a fit state for working and passing therein." The section does not say upon whom the duty is imposed.

Sect. 14, sub-s. 1: "For every mine there shall be appointed by the manager in writing one or more competent persons (hereinafter referred to as firemen . . . .) to make such inspections and carry out such other duties as to . . . . ventilation . . . . as are required by this Act and the regulations of the mine."

Held, (1.) that the duty of providing sufficient ventilation is imposed upon the persons having the management of the mine, and that in the event of a complaint of its insufficiency it is no defence for the manager to say that he had appointed a competent fireman under s. 14;

(2.) that the "shafts, roads, levels, stables, and workings of the mine" include portions of the mine contiguous thereto although not coming strictly within any of those denominations.

Case stated by justices of Monmouthshire.

The respondent, Howell Morgan, was summoned upon an information charging that he being manager of a certain mine known as the No. 3 Griffin Pit, Blaina, on or about May 25, 1914, unlawfully failed to cause to be produced an adequate amount of ventilation in a certain cavity in the roof of the said mine as required by s. 29 of the Coal Mines Act, 1911.

At the hearing the following facts were proved or admitted:—The respondent at all material times was the duly appointed manager of the mine pursuant to the provisions of ss. 1 and 2 of the Coal Mines Act, 1911. A copy of the prescribed abstract of the Coal Mines Act and a correct copy of the regulations of the mine were duly posted up at the mine. The cavity in the roof in question was on a double parting called Austen's parting in the John Davies level of the said mine. A number of men had to pass along the parting to get to and from working places. Owing to the soft and friable nature of the roof the parting was heavily timbered. A large quantity of rubbish had from time to time

1915

ATKINSON v. MORGAN.

fallen on to the timbering and it was impossible up to a fortnight before May 22, 1914, for any one to get on top of the head or roof timbers to make any inspection of the condition of the strata above. About a fortnight before May 22, 1914, some of the timber had got broken by the pressure thereon, and instructions were given by the respondent to the overman and fireman in charge of the district to have the broken timber removed and replaced by new timber, and such work was proceeded with and carried out under their supervision. On May 22 during the progress of the work a large fall of rubbish took place from the strata above, breaking down some of the head or roof timber and leaving a cavity in the roof about twenty-four feet above the level of the ground. The roof timber was about eight feet above the ground level of the parting, and the cavity above the timber varied from twelve feet wide at the bottom to four feet at the top with a length of nineteen feet. The rubbish consequent upon such fall was removed on the night of Friday, May 22, and the morning of Saturday, May 23, and the roadway was temporarily repaired by being timbered and lagged—i.e., roofed over with boards—at the normal height of the head or roof timber so as to prevent any rubbish falling on to the floor, by which action the ventilating current was partially shut off from the cavity above except such as percolated through the lagging and loose and broken ground adjacent to the cavity. The work was completed by noon on May 23. There was no work in the pit between noon of May 23 and 6 o'clock A.M. on May 25. The roof had been broken and was timbered both "out bye" (outwards) and "in bye" (inwards) from Austen's parting. No further steps were taken to ventilate the cavity between midday on May 23 and May 25, as there was no repairing shift on duty to do the work, and it was considered by the fireman in charge that the ventilation passing between the lagging and through the loose ground was sufficient to ventilate the cavity temporarily. If the men's examiners had not discovered the gas on the morning of May 25 the cavity would have been properly ventilated on the night of May 25 when the repairing shift came to work. When it was examined by the fireman on duty, one George Watkins, on the night of May 22 and at 5 A.M. on

May 23 no gas was found in the cavity. The cavity was not examined for gas by any colliery official between midday on Saturday, May 23, and the morning of May 25 after the men had gone in to work, when the presence of gas in the cavity was reported by the men's examiners. The reason why no such examination was made by the colliery officials between midday on May 23 and midnight on May 24 was that there was no work in the pit. On the morning of May 25 two examinations were made of the parting by one John Newill, the fireman in charge, the last examination being made about 5.30 A.M. He examined the roadway along which the workmen would pass upon both occasions, but found no gas. He did not examine the cavity above the parting as he found "the place all in a work," that is to say, the roof was trembling and some rubbish was falling on the timber, and he considered it too dangerous for him to go up above the timber into the cavity. The fireman permitted the men to go to work at 6 A.M. on May 25, and to pass along Austen's parting without any sign of warning that the cavity had not been examined, the reason given by the fireman being that he discovered no gas when he made his examination of the parting at 5.30, that he considered it safe for workmen to travel along such parting, and that he reported to the oncoming fireman, who came on duty at 6 A.M., that he had not gone up into the cavity as he considered it too dangerous to do so, as he had found the place to be "on the work." Two of the men's examiners went up into the cavity and examined it between 1 and 2 P.M. on May 23 and found gas present. They did not, however, report it to any official, contrary to s. 67 of the Coal Mines Act, 1911. They again examined the cavity at 6.40 A.M. on May 25 and found gas there in considerable quantities. They then caused the men who had passed into their work to be withdrawn, and reported the presence of gas to the fireman on duty. A joint examination of the cavity was then made by the men's examiners and the colliery officials and the cavity was found to contain a considerable quantity of gas. Thereupon steps were taken to direct the ventilation into the cavity by putting up brattices or sheets, and taking such sheets or brattices up step by step by timbers known as cogging and so clearing the gas. Apart

1915

ATKINSON v. MORGAN.

from the question of its distribution thereafter an adequate amount of ventilation reached Davies level and Austen's parting. The respondent had no personal knowledge of the condition of the cavity between May 22 and May 25.

It was contended on behalf of the appellant that the duty to produce an adequate quantity of ventilation was absolute, and that the presence of gas in the cavity both on the 23rd and 25th conclusively showed that sufficient ventilation was not being produced in the cavity.

The justices found (1.) that the respondent had taken all reasonable means to prevent contravention of the provisions of the Act by publishing and to the best of his power enforcing those provisions within the meaning of s. 75 (1) ; and (2.) that an adequate amount of ventilation to dilute and render harmless inflammable and noxious gases was produced in the mine, though not thoroughly disseminated in the cavity, and they thereupon dismissed the information.

Clement Edwards, for the appellant. The first finding of the justices was based upon the mistaken assumption that the protection afforded by s. 75 applies to the present case. That section only applies to a case in which the owner, agent, and manager are made responsible for the default of other persons ; it has no application to a case where the manager has been guilty of a personal default. Sect. 29 provides that "An adequate amount of ventilation shall be constantly produced in every mine to dilute and render harmless inflammable and noxious gases to such an extent that all shafts, roads, levels, stables, and workings of the mine shall be in a fit state for working and passing therein." It is true that the section does not say upon whom that duty is imposed, but it is obvious that

(1) By s. 75 of the Coal Mines Act, 1911, "In the event of any contravention of or non-compliance with any of the provisions of this Part"—Part II.—"of this Act by any person whomsoever, the owner, agent, and manager of the mine shall each be guilty of an offence against this Act, unless he proves that he had taken all reasonable means by publishing and to the best of his power enforcing those provisions to prevent that contravention or non-compliance."

Part II. of the Act includes s. 29.

it must be intended to rest upon the manager. The ventilation is to be sufficient to render "*all* shafts, roads," &c., fit for working, and the duty of producing such a result cannot have been imposed upon any subordinate official such as a fireman, whose duties might only take him into a portion of the mine. With regard to the second finding of the justices, if it meant that there was no obligation to ventilate the cavity, provided the roads and mine generally were well ventilated, it is wrong in law. In *Brough* v. *Homfray* (1) it was held, under the corresponding section of the Mines Regulation Act, 1860 (23 & 24 Vict. c. 151, s. 10), that it was not a sufficient compliance with the section to cause ventilation to pass along the working places and travelling roads themselves, if the parts contiguous thereto were not ventilated so as to render the working places and travelling roads safe. The attention of the justices was not called to that case. Here the cavity was so large, containing as it did several thousand cubic feet, that it was essential to the safety of the roads and working places near it that it should be properly ventilated. This should have been done by means of brattices, or sheets carried up from the floor of the road into the cavity, which would have diverted the current of the air up into the top of the cavity on one side of the brattice and then down the other; whereas the lagging, or wooden ceiling to the road, which was in fact put up, had the effect of shutting off the ventilation from the cavity. Whether the manager would be liable for an omission to carry the ventilation through some newly-created cavity before he knew of its existence it is not material to inquire, for here the respondent did know of it on the night of May 22. The meaning of the last paragraph of the case stated is that he knew at the time then mentioned of the fact of the cavity, though he did not know that it contained gas.

Disturnal, K.C., and *Trevor Lewis*, for the respondent. The effect of s. 29 is not to cast the duty of providing adequate ventilation upon the manager. When that section is read along with s. 14, sub-s. 1, it appears that it is put upon the fireman. By that sub-section "For every mine there shall be appointed by the manager in writing one or more competent persons (hereinafter

(1) (1868) L. R. 3 Q. B. 771.

1915

ATKINSON v. MORGAN.

referred to as firemen, examiners, or deputies) to make such inspections and carry out such other duties as to the presence of gas, ventilation, state of roof and sides, and general safety . . . . as are required by this Act and the regulations of the mine." Under the General Regulations, July 10, 1913, made by the Secretary of State, the fireman of a particular district of a mine "shall see that all doors, stoppings, brattices and fences in his district are maintained in good order" (reg. 54). "He shall see that every ventilation door is so fixed and maintained that it will fall to and close automatically" (reg. 57). No doubt he is to act under the general order of the manager. "When brattices or air pipes are required by the manager . . . . to be used for the ventilation of the working places the fireman . . . . shall see that they are kept sufficiently advanced to ensure that an adequate amount of air reaches the working faces" (reg. 55). But the carrying into effect of general regulations and the application of them to local conditions as they arise is for the fireman. The requirement in s. 3 of the Act that "daily personal supervision shall be exercised by the manager" does not mean that he is to go into every part of the mine every day, for that would be a physical impossibility. Then if the duty of ventilating this particular cavity was on the fireman the manager was only liable under s. 75, and is entitled to the defence allowed by that section. The justices have found that he had taken all reasonable means to enforce the provisions of the Act by appointing a competent fireman for that purpose, and with that finding of fact the Court will not interfere.

Clement Edwards in reply. Regulation 55 shows that the scheme of ventilation in a mine is to be regulated by the manager. A fireman cannot be allowed to have a scheme of his own. He cannot put up a brattice to get rid of a local difficulty. Under regulation 54 he is to see that all brattices are maintained in good order. But that implies that they are already there; he cannot put them up where none were before. Even if s. 75 applies to this case, which is disputed, there was no evidence on which the justices could find that the conditions of the defence thereby provided were satisfied.

1915

ATKINSON v. MORGAN.

LORD READING C.J. In this case an information was laid by an inspector of mines against the respondent, who is the manager of a certain coal pit, charging that he had committed a breach of s. 29 of the Coal Mines Act, 1911, in consequence of his having failed to produce an adequate amount of ventilation in a certain cavity in the roof of the mine. It appears that about a fortnight before May 22 the respondent gave orders to replace some broken timber with new timber, and on May 22 while that work was being carried on there was a fall of rubbish which broke down the roof timber and left a cavity in the roof. The rubbish was removed on the night of the 22nd, and on the following morning the roadway was lagged to prevent rubbish falling on the floor. By that action the ventilating current was partially shut off from the cavity above. The work was finished by noon on the 23rd. It is clear from the case, and indeed is not in dispute, that the respondent personally knew on the 22nd, or at any rate on the morning of the 23rd, that there had been a fall of rubbish and that the cavity in question had been caused. It is equally clear that by the partial shutting off of the ventilation from the cavity an offence had prima facie been committed by him under s. 29. What is said in defence is that he had brought himself within the exception in s. 75; and the justices found as a fact that he had taken all reasonable steps to prevent any contravention of s. 29. Of course if there was any evidence to support that finding we could not interfere, but I am unable to see that there was any such evidence. Between the time when he knew of the cavity and 6.40 A.M. on May 25 no step was taken to ventilate the cavity. So far from his having taken all reasonable means to ensure its ventilation, he took none at all. What was said in argument was that he had appointed a competent fireman, and that the fireman had given him no notice of the shutting off of the ventilation from the cavity. If that fact were to be held to give the respondent the benefit of s. 75 we should be cutting down considerably the salutary provisions of this Act. We cannot accept the contention that a manager whose mine is inadequately ventilated has not committed an offence if he appointed a competent person to look after the ventilation and then troubled himself

1915

ATKINSON v. MORGAN.

Lord Reading C.J.

no further about it till information was brought him of some defect having arisen. This Act was passed for the purpose of providing for the safety of persons working in coal mines, and to prevent explosions arising from preventable causes. In order to ensure that it imposed a duty to constantly provide sufficient ventilation for the rendering harmless of inflammable and noxious gases, and in my opinion it imposed that duty on the manager. It is true that s. 29 does not in terms say on whom the duty is imposed, but I think it is clear that the Legislature intended that the management, the persons who were responsible for the construction of the mine and the provision of proper apparatus and machinery, should be liable for any breach of that section. So far as I can see, although it is unnecessary to decide the point, that section imposes no duty on the fireman. With regard to the second finding of the justices that there was an adequate amount of ventilation in the mine generally though it was not thoroughly disseminated in the cavity it is enough to say that they would not have found as they did if their attention had been called to the case of *Brough* v. *Homfray*. (1) That case is an authority that such a finding affords no defence. The justices there thought that a certain section (which was in substantially the same terms as s. 29 of the present Act) was sufficiently complied with if the ventilation was maintained in the working places, but the Court refused so to restrict its meaning and held that it extended to those parts of the mine which were contiguous to working places as well as to the working places themselves. In my opinion this appeal must be allowed.

AVORY J. I am of the same opinion. I think the liability of the manager in this case may be stated in this way. On May 25 the mine was not managed in conformity with the Act by reason of the fact that an adequate amount of ventilation was not produced in a cavity which was contiguous to the roads and workings of the mine, that being the interpretation which the Court has already put on similar language. Under those circumstances s. 101, sub-s. 2, says that the manager shall

(1) L. R. 3 Q. B. 771.

be deemed to be guilty of an offence. Then s. 102, sub-s. 3, provides a defence to managers under certain circumstances, but it is not suggested that those circumstances exist in the present case. What is suggested is that the respondent is protected by the provisions of s. 75. Now in my opinion it is worthy of consideration whether that section has any application to this case. It says that in the event of any contravention of any of the provisions of this part of this Act by any person whomsoever the manager shall be guilty of an offence unless he proves that he had taken all reasonable means to prevent that contravention. This part of the Act contains many offences which may be committed by the workmen themselves, such for instance as the doing of wilful damage (s. 72), the working by an inexperienced person alone as a getter (s. 73), and the neglect to observe directions with respect to working (s. 74); and it looks as if s. 75 was intended to apply to offences of that kind only, offences for which the manager is made vicariously responsible. But assuming that s. 75 does apply I agree with my Lord in thinking that the respondent did not bring himself within its protection, for there was no evidence that he had taken any means at all to enforce the provisions of s. 29. I agree that the appeal should be allowed and the case remitted to the magistrates to convict.

Low J. I agree.

Appeal allowed.

Solicitors for appellant: *Vachell & Co., Cardiff.*

Solicitors for respondent: *Bell, Brodrick & Gray, for Kensoles & Prosser, Aberdare.*

J. F. C.

C. A.
1915
March 25, 26.

[IN THE COURT OF APPEAL.]

HUTH *v.* HUTH.

[1914 H. 275.]

Libel—Publication—Communication posted in Unclosed Envelope.

The defendant sent through the post in an unclosed envelope a written communication which the plaintiffs alleged was defamatory of them. The communication was taken out of the envelope and read by a butler who was a servant at the house to which the envelope was addressed in breach of his duty and out of curiosity. In an action for libel brought by the plaintiffs against the defendant:—

Held, that there was no evidence of publication by the defendant of the communication, and that therefore the action would not lie.

Appeal by the plaintiffs from a judgment of Darling J.

The action was brought to recover damages for libel and for an injunction. At the trial, which took place at the Sussex Assizes on July 11, 1914, before Darling J. and a special jury, the learned judge held that there was no evidence of publication and entered judgment for the defendant.

The plaintiffs were four infants who sued the defendant, their father, by their next friend Miss Hilda Stark. The defendant, Captain Philip S. Huth, R.N.R., was married in 1898 to Miss Edith Greaves, and the plaintiffs were the issue of the marriage.

Up to September, 1913, Captain and Mrs. Huth lived together at Wadhurst, when, owing to differences with her husband, Mrs. Huth left her husband's house at Wadhurst and went with her children to live at Torquay at a house called "Hillstead," where her friend Miss Stark resided. The alleged libel was sent by the defendant to Mrs. Huth by post in an unclosed envelope bearing a halfpenny stamp, addressed by some person whose writing was not identified to "Miss Edith Greaves, care of Miss Stark, Hillstead, Torquay." The unclosed envelope contained an account which had been originally sent in a closed envelope stamped with a penny stamp by a saddler named Boyes at Wadhurst to Mrs. Huth at the Wadhurst address in respect of a bill for 3*l.* 8*s.* 3*d.* which had been incurred by Mrs. Huth. The defendant had taken the account out of the envelope in

which it was enclosed by the saddler and placed it in the unclosed envelope after he had crossed out the name Mrs. Huth on the account and had written upon it (omitting immaterial words) "Not known. Try Miss Edith Greaves," and also the following words: "To Mr. T. Boyes, saddler, Wadhurst. The woman known as 'Mrs. Huth' will henceforth take her maiden name of Miss Edith Greaves." On the back of the account the defendant had written: "The woman in question has forfeited all claims to the title of 'Mrs. Huth,' and I hereby and herewith disown her. P. S. Huth. To Mr. T. Boyes, saddler, Wadhurst." He then placed the account with the writing upon it in the unclosed envelope stamped with a half-penny stamp which he sent by post to Mrs. Huth. The plaintiffs alleged that the words meant and were understood to mean that Mrs. Huth was not married and that the plaintiffs were illegitimate.

At the trial, Alfred Edward Manners, a butler who had been in the service of Captain and Mrs. Huth at Wadhurst for some years and continued in Mrs. Huth's service when she left her husband and went to live at Torquay, was called and said that the letter was delivered at the house at Torquay by post and that he took the account out of the envelope and read what was written upon it out of curiosity. He then placed it upon the breakfast table without comment. He knew that Mrs. Huth's maiden name was Miss Edith Greaves.

At the close of the plaintiffs' case Darling J. held that there was no evidence of publication, as the butler had no right to take the document out of the envelope, and that the words were not capable of bearing the meaning alleged, as the children were not mentioned. He therefore entered judgment for the defendant.

The plaintiffs appealed.

H. A. McCardie and *Barrington-Ward* (*Marshall Hall, K.C.*, with them), for the appellants. There was sufficient evidence of publication of the defamatory matter placed upon the account by the respondent in the fact that the butler took the account out of the envelope and read what was written upon it.

C. A. 1915

HUTH v. HUTH.

In the early stage of the law of libel there was a marked distinction between a closed up and an open letter. Letters not closed up fall into the same category as post-cards.

Thorley v. *Lord Kerry* (1) was an action on a libel published in a letter which the bearer, who had no authority to do so, happened to open, and that case shows that a man is responsible for the publication which has arisen through the curiosity of a person into whose hands the letter happens to pass. Belief that a third person might open it is evidence to go to the jury of intended publication: *Delacroix* v. *Thevenot* (2); *Gomersall* v. *Davies*. (3) A letter not sealed or fastened up is analogous to a post-card, and a post-card is a publication to every one through whose hands it passes.

[LORD READING C.J. It is assumed that whatever you write on a post-card will be read.]

That shows how material curiosity is as regards the question of publication. There is no difference in principle between the case of an unclosed letter, a post-card, and a telegram, and a communication which would not be actionable if sent in a closed letter may be so if sent by telegram: *Williamson* v. *Freer* (4), approved in *Robinson* v. *Jones*. (5) The question whether or not there has been publication is for the jury: *Clutterbuck* v. *Chaffers*. (6)

The butler had been in service with Captain and Mrs. Huth for some years and it was part of his duty to attend to the letters. That point was not dwelt upon by Darling J. The defendant knew that the document was likely to be taken out of the envelope and read and he must be responsible for it.

The only obligation on the plaintiffs is to show that the words are susceptible of a defamatory meaning, and unless it would be wholly unreasonable to attribute a libellous meaning to them it should be left to the jury to say whether the publication has the meaning ascribed to it: *Capital and Counties Bank* v. *Henty* (7); *Beamish* v. *Dairy Supply Co.* (8); *Linotype Co.* v. *British Empire Type-setting Machine Co.* (9)

(1) (1812) 4 Taunt. 355.
(2) (1817) 2 Stark. 63.
(3) (1898) 14 Times L. R. 430.
(4) (1874) L. R. 9 C. P. 393.
(5) (1879) 4 L. R. Ir. 391.
(6) (1816) 1 Stark. 471.
(7) (1882) 7 App. Cas. 741.
(8) (1897) 13 Times L. R. 484.
(9) (1899) 81 L. T. 331.

In the present case the gist of the libel lies in the innuendo that the children are illegitimate; and the inverted commas to the name—"Mrs. Huth"—do not imply the existence of a valid marriage.

Hohler, K.C., and *C. Doughty*, for the respondent. There is no case in which it has ever been held that there has been publication where the letter has been sent in an envelope. In the case of a post-card or telegram there is a presumption of fact the ground for which is that when a person sends a communication wholly uncovered the reasonable inference is that he contemplated that the matter would be published, but that has never been extended to anything in an envelope. Both *Thorley* v. *Lord Kerry* (1) and *Gomersall* v. *Davies* (2) were cases totally different from this. Here there is the undisputed evidence of the butler himself that he took the account out of the envelope and read what was written upon it out of curiosity. There can be no publication in those circumstances. This letter was no libel on the children, there was nothing to connect it with them. There is no proof that anything was published of and concerning the plaintiffs.

McCardie in reply. In the case of a telegram there is undoubtedly publication on the part of the sender because the words it contains must be read by the post office clerk. At the other end of the scale is the sealed envelope where it is clear that the sender has taken all possible precautions unless it can be shown that he knew that it would probably be opened. *Robinson* v. *Jones* (3) turned upon the question whether adequate precautions had been taken to prevent publication. Intermediate between the sealed letter and the telegram comes the gummed envelope. Here the sender has taken all reasonable precautions of a modern character to prevent publication. Whether there has been publication depends on a presumption of fact. If an envelope was sent with the flap cut off so that the contents are visible there would be publication, not as a matter of law but because the jury may infer as a fact that there is publication. The question is one of fact for the jury. There would be evidence

(1) 4 Taunt. 355. (2) 14 Times L. R. 430.
(3) 4 L. R. Ir. 391.

C. A. 1915

HUTH v. HUTH.

of publication upon the ground that the defendant had not taken proper precautions to prevent publication to a third person, and the question for the jury would be whether the defendant had not done something from which they ought to infer publication. The decision in *Delacroix* v. *Thevenot* (1) was based upon the ground that though the defendant had taken the precaution of gumming his letter, he had not taken the precaution of putting "private" upon it, and therefore in the circumstances he had not taken reasonable precautions to prevent publication. If instead of cutting off the flap of the envelope a person leaves the flap open because he thinks that cutting it off would show too clearly that he wanted the contents to be read there would still be a question of fact for the jury whether there was publication. No jury could ignore the fact that letters with halfpenny stamps are opened by persons who would not otherwise open them. If a person writes a libel and sends it out to the world he has created a weapon of danger and perhaps of disaster, and the law places upon him the burden of taking reasonable precautions when he sends it forth that it is not published.

It is the duty of the postal authorities to see if the contents of an envelope comply with the Post Office Regulations. It is a question for the jury whether there is a probability to the knowledge of the defendant that they will be read. If there is and the contents are read it will be publication. Proper precautions must be taken when a person is sending defamatory matter, and he takes the risk of its being read. If the law were otherwise the result would be to afford a shield to libellers. [Odgers on Libel, 5th ed., p. 163, was also referred to.]

LORD READING C.J. In this case the plaintiffs, who are four infants, brought an action for libel by their next friend against the defendant, who is their father, the object of the action being, it is said, to obtain an injunction to prevent the repetition of matter which, according to the plaintiffs' case, is defamatory.

For some reason which has not been brought to the knowledge of the Court the wife of the defendant left him, and went to live at Torquay with her four children, in the house of a

(1) 2 Stark. 63.

Miss Stark, the next friend. It is neither material nor necessary to probe into the delicate question of the relations existing between husband and wife: it is sufficient to say that evidently the defendant was extremely angry with, or wished in some way to annoy, his wife, and he sent a letter addressed to her which has given rise to this action. The letter was addressed to Mrs. Huth by her maiden name, care of Miss Stark, at the address at Torquay. Inside the letter was an account, an ordinary tradesman's bill, which had been sent by a saddler named Boyes to Mrs. Huth at Wadhurst, where Captain Huth was still living, in respect of an account for 3*l.* 8*s.* 3*d.* which had been incurred upon orders given by Mrs. Huth. Captain Huth sent the account in an envelope addressed as I have just described, and on the account wrote the words complained of in this case. "Mrs. Huth" was struck out, and in the defendant's handwriting appear "Not known. Try Miss Edith Greaves"; that was the maiden name of Mrs. Huth. Later there appear on the same document addressed to the saddler: "The woman known as 'Mrs. Huth'"—"Mrs. Huth" was in inverted commas—"will henceforth take her maiden name of Miss Edith Greaves. Yours truly, P. S. Huth." Again on the same document was written: "The woman in question has forfeited all claims to the title of 'Mrs. Huth'"—"Mrs. Huth" was again in inverted commas—"and I hereby and herewith disown her. P. S. Huth." That account, with that writing upon it by the defendant, was enclosed in the envelope addressed to the lady in her maiden name, under cover of a halfpenny stamp, and consequently in an envelope which was neither sealed nor gummed.

When the action came before Darling J. and a jury, he withdrew the case from the jury on the grounds (1.) that there was no evidence of publication; (2.) that the words complained of were not capable of a defamatory meaning in relation to the persons who were suing; the defendants' four children and not the wife were suing, on account of the difficulties presented by the law relating to husband and wife. The complaint on behalf of the plaintiffs was that the libel alleged by way of innuendo that as Mrs. Huth had not gone through a valid marriage ceremony with Captain Huth, the plaintiffs, the four children,

C. A. 1915

HUTH v. HUTH.

Lord Reading C.J.

were illegitimate. The learned judge came to the conclusion that the words complained of were not capable of bearing a defamatory meaning with regard to the four children. The plaintiffs appealed to this Court, and we have had an able and interesting argument upon both questions. With regard to the first point it was contended on behalf of the plaintiffs that there was evidence to go to the jury that the document enclosed in the envelope had been published to some third person because, first, the butler had in fact read it, his attention having been attracted by the peculiar form of address to Mrs. Huth, as he had lived for some years with Captain and Mrs. Huth, and that he then took out the account and read the defamatory matter. The butler was called at the trial and said that he opened the letter in the sense of removing the document from inside the envelope, and read it, and that he did so because he was curious. It would be impossible successfully to contend—and it is not contended, as I understand—that if a person, in breach of his duty, were to open a letter, and there was no reason to expect that he would commit that breach of duty, the fact that he had opened it and read it would amount to publication by the person who sent it; but on behalf of the appellants it was contended that, as the document was enclosed in an unsealed and ungummed envelope, it must be assumed that the defendant knew, or ought to have known, or might have expected, that a servant in the house would open a letter in such an envelope. It was further contended that an envelope unclosed, with a halfpenny stamp on it, is always liable to be opened by the postal authorities and the document it contains examined and read, and consequently that it must be held in the present case that there was some evidence of publication to the Post Office. With regard to the first point—the alleged publication to the butler—I am clearly of opinion that there is no evidence of publication to him by the defendant merely in the fact that the butler opened and read the letter because he was curious. Fortunately, it is no part of a butler's duty to open letters which come to the house of his master or mistress addressed to them; and in this case there is nothing exceptional, save that his curiosity was excited by reason of the lady being addressed by her maiden name. It is impossible to

prevent a man's curiosity being excited, but it does not justify him in opening a letter, and (which is the only matter of importance in this connection) the butler's curiosity could not make the defendant liable for the publication to him of the contents of the envelope. It must of course be borne in mind that however insulting and offensive the matter might be which the husband wrote to his wife, if it was addressed to the wife and only intended for her, and she alone saw it, no action for libel could be brought by her: an action for libel can only be brought if there is publication to some third person. In my judgment there was no evidence of publication to the butler.

Mr. McCardie has strenuously and very ingeniously raised a further point on behalf of the appellants with regard to the Post Office, and I think that the broad general proposition he has submitted requires examination with some care. I should certainly be very sorry to lay down any proposition of law which would enable libels to be published with greater safety than has hitherto been the case. Mr. McCardie based his proposition upon the ground that there is a presumption of fact that the contents of a post-card sent through the post have been published to some third person, and consequently the mere proof that the post-card was written by the defendant, and posted by him, is in itself held to be some evidence that the defendant published the writing on the post-card. That doctrine is founded upon very clear grounds rather of fact than of law. It has been laid down—I think rightly—that the Court will take judicial notice of the nature of the document, i.e., that it is a post-card, and will presume, in the absence of evidence to the contrary, that others besides the person to whom it is addressed will read and have in fact read what is written thereon. That is the presumption of fact which arises as a matter of law. If, even in such a case as that, the defendant could establish that the post-card never was read by a single person—although it is very difficult to conceive that the proof could be given—he would, notwithstanding the presumption, succeed in the action, because he would have proved that there was no publication. The fact that it is practically impossible to prove that any third person read it is the reason why the law takes judicial notice of the

C. A. 1915

HUTH v. HUTH.

Lord Reading C.J.

nature of the document, and says that the mere fact that the words are written on a post-card which is posted must be taken as some evidence that a third person will read it, or has read it. That is clear law and is quite beyond dispute. Mr. McCardie contends that if that is so with regard to a post-card, the same presumption must be made with regard to an unsealed and ungummed letter; in other words that a document circulated with a cover must be treated just as would be one without a cover. The question is whether that contention is sound. He has referred us to several authorities which require to be very shortly examined. With regard to *Thorley* v. *Lord Kerry* (1), which came before Sir James Mansfield C.J. in the year 1812, the point was not taken. The matter came before the Court on a writ of error. It appears that Lord Kerry had written a letter which he had delivered unsealed to his servant to carry. One does not wonder that the point that that was no evidence of publication to the servant was not taken, for the period was long before the days of post-cards, or of a halfpenny post in unsealed or ungummed envelopes. It was further contended that in *Delacroix* v. *Thevenot* (2) there was a similar statement of the law, although under different circumstances. Lord Ellenborough there held that inasmuch as the letter, which was not marked "private," was sent to the address of the plaintiff, and the clerk there was in the habit of opening letters directed to the plaintiff which were not marked "private," and the clerk opened the letter, there was evidence of publication to the clerk. It is to be observed that in that case the clerk said he opened the letter, and that he believed that the defendant knew that he was in the habit of opening the plaintiff's letters and therefore it was proved that there was publication to him.

Our attention was also directed to the judgment of Palles C.B. in *Robinson* v. *Jones*. (3) It does not carry the matter any further. It deals with a question of privilege and only restates the law with regard to post-cards. *Gomersall* v. *Davies* (4), which came before the Court of Appeal, was also referred to. In that case a letter was sent to the plaintiff by the defendant

(1) 4 Taunt. 355.
(2) 2 Stark. 63.
(3) 4 L. R. Ir. 391.
(4) 14 Times L. R. 430.

and was opened by the clerk of the addressee, the plaintiff, in the ordinary course of business. It was held that there was evidence of publication to go to the jury immediately it was proved that the clerk opened the letter in the ordinary course of his duty, and read it. Questions were left by the judge to the jury, who answered them in favour of the plaintiff, and the Court of Appeal were of opinion that the questions were rightly left to the jury because on the facts there was evidence that, to the defendant's knowledge, letters addressed to the plaintiff and received in the ordinary course of business would be likely to be opened by persons in the plaintiff's employment. It is to be observed that the distinction between the position of the clerk in that case and that of the butler in the present case is that the clerk opened the letter in the ordinary course of his business, while the butler opened it in breach of his duty, outside the ordinary course of his business.

It appears to me—having given consideration to all the authorities to which our attention has been called—that there is no such presumption as was contended for by Mr. McCardie with regard to letters which are unclosed. It is not right, in my view, to treat a letter sent in an envelope with a halfpenny stamp and ungummed as though it were an open letter. Before the document can be abstracted from the envelope and read, there must be some act by the person who has it in his hands in the nature of opening the letter which is ungummed, and I do not think that the Court can presume that letters would be opened in the ordinary course of business, or that they might be opened if sent in this fashion. It is quite true that the Post Office authorities have the right to examine the document which is in the envelope with the halfpenny stamp upon it. It is part of the duty of the Post Office authorities to see that that which is sent under cover of a halfpenny stamp is matter which can properly be sent for a halfpenny and that it does not require a penny stamp. But that is not sufficient for the success of the appellants in this case. If they could have called a postman, or a postmaster, or some official who would have said "Yes, I examined this document and read it in order to see whether it could properly go through the post under a halfpenny stamp," then would arise a state of

C. A. 1915

HUTH v. HUTH.

Lord Reading C.J.

things which I think would amount to evidence of publication by the defendant. But that is where the appellants fail. No such person can be called. I cannot think that the Court is entitled to presume, merely because the letter went through the post, that it would be opened. I suppose that what is said with regard to letters with a halfpenny stamp upon the envelope is true of every package and parcel which is sent through the Post Office, and in certain circumstances it may be true also of other documents even though they may be sealed. But that does not justify the presumption that a letter in an envelope which is ungummed is to be treated just as a post-card. I think that that point fails, and that there is, therefore, no evidence of publication in this case.

Upon the point as to whether the words are capable of a defamatory meaning I do not propose to express any opinion. It is sufficient to dispose of this case by holding that there was no evidence of publication. Of that I am satisfied, and therefore the appeal must be dismissed.

SWINFEN EADY L.J. This action is one of an unusual character, being an action by infant children against their father for libel. It claims damages and an injunction, and the object of the action is to stop the defendant's wife being annoyed and distressed by documents, alleged to contain statements defamatory of the plaintiffs, being sent to her through the post. In form it is an action by the children, and that form was necessary by reason of the wife being unable to bring an action of this kind against her husband. The substance of it is to protect the wife against a further incursion of these documents.

The learned judge at the trial held that there was no evidence of publication, and it is that point which is first raised on this appeal. The document in question was enclosed in an envelope, but the envelope was not sealed or fastened with any adhesive matter, or otherwise, and it was sent through the post with a halfpenny stamp upon it. The alleged publication was that the butler, on receipt of the letter through the post, opened the envelope, perused the enclosure, and, having replaced it in the

envelope, placed it without comment on the dining-room table for his mistress. The mistress was in the house and was living there at the time. It is not suggested that the butler had any duty in connection with the letter except to put it unopened on the table. The butler was called at the trial and said, on being pressed, that he opened it from curiosity to see what the enclosure was. It was therefore opened and perused by the butler in breach of his duty. In my judgment the question of publication can shortly be disposed of in this way. There was no evidence of publication because there was no evidence that, to the defendant's knowledge, a letter addressed to his wife and enclosed in this envelope—but unsealed and unstuck down—would, in the ordinary course, be likely to be opened by the butler or by any other person in the employ of the mistress, or at the mistress's house, before it was delivered to her.

When the authorities which were referred to are considered it will be seen that, in each of those cases, the defendant—who must be dealt with upon the footing that he intended the natural consequences of his act in the circumstances of the case—intended the publication which in fact took place. In *Delacroix* v. *Thevenot* (1), where the libel was contained in a letter and the letter was opened by a clerk, the evidence was not only that the clerk was in the habit of opening letters directed to his master which were not marked private, but that the defendant, who was acquainted with the plaintiff, was aware of the nature of the clerk's employment. Lord Ellenborough said that in those circumstances there was sufficient evidence for the jury to consider whether the defendant did not intend the letter to go into the hands of a third person, which would be a publication. It must be borne in mind, in connection with a publication of this sort, that it is immaterial whether the letter is sealed or unsealed, because if a person sends a letter, although carefully sealed, to, say, a merchant at his office, knowing that the merchant has a staff of clerks who in the ordinary course of business open all letters sent to the merchant's office, that would be clearly a publication if the letter were opened and perused by a clerk in that way, even although that letter were

(1) 2 Stark. 63.

C. A. 1915

HUTH v. HUTH.

Swinfen Eady L.J.

most carefully sealed. Again, in *Gomersall* v. *Davies* (1) the question raised on appeal was whether there was evidence of the publication of the libel. What had happened was that the plaintiff was a man engaged in the business of a game and poultry salesman, and evidence was given that in the ordinary course letters addressed to him would be opened by his clerk or foreman, and brought to him in the market, and A. L. Smith L.J. dealt with it on appeal in this way, the question being whether there was evidence of publication; he said: "The jury, in answer to questions put to them, found that the plaintiff's business was such that, to the defendant's knowledge, letters addressed to the plaintiff, and received in the ordinary course of business, would be likely to be opened by persons in the plaintiff's employ. In the face of that finding, how could it be said that this was an accidental publication?" In each of those cases, therefore, there was evidence from which publication could be established by the fact that it was published in the way that the defendant must have been presumed to have intended it. Evidence of that sort is entirely wanting in the present case.

On behalf of the appellants Mr. McCardie urged that a letter enclosed in an unclosed wrapper or envelope must be treated as being on the same footing as a post-card, or a telegram. I am quite unable to accede to that view. With regard to a post-card and a telegram, it was said by A. L. Smith M.R. in *Sadgrove* v. *Hole* (2) that "It is certainly my opinion that if a man writes a libel on the back of a post-card and then sends it through the post there is evidence of publication, as in the case of a telegram. The cases cited show that the two stand on the same footing"; but that is wholly different from a case where a communication is enclosed in a cover, and is not, without some unauthorized act, withdrawn from the cover and perused. If the plaintiffs had been able to establish that the perusal of this communication was in the ordinary course by a person in the discharge of his duty, the case would have been different, as, for instance, if they were able to show that it was withdrawn and perused by a Post Office official. By the Post Office Regulations

(1) 14 Times L. R. 430. (2) [1901] 2 K. B. 1, at p. 4.

there are certain things which are prohibited from being sent through the post at all. There are other things which the public have a privilege of sending under a halfpenny stamp, but they are a limited class of things, and if the article, say a communication in the nature of a letter, is sent in this way, it is liable to be surcharged, and, in order to protect the Post Office, the Post Office officials have certain statutory powers. In the General Post Office Rules contained in the Post Office Guide for January to March, 1915, at pp. 17 and 18 under the heading "Prohibited Articles," it is stated that it is provided by the Inland Post Warrant of 1903 that certain articles shall not be posted, or conveyed, or delivered by post, and if they are, in breach of this regulation, tendered for transmission, transmission will be refused, or if they are detected in transit, they will be detained, and they are liable to be dealt with in such manner as the Postmaster-General may direct, and the sender is liable, in some cases, to prosecution. Although, therefore, persons in the employ of the Postmaster-General in the discharge of their duty may have to peruse and examine postal communications, and although a publication of a libel in that way would be established if perusal took place, there is no inference of fact or law to be drawn that, in all cases, communications of this sort are opened and read by the Post Office officials.

In these circumstances I am of opinion that in the present case there was no evidence of publication to go to the jury and the learned judge was right in the view that he took, and the appeal on this point fails. That being so, it is not necessary to consider the other portion of the case.

BRAY J. I am of the same opinion. At the trial the learned judge withdrew the case from the jury on two grounds—first, that there was no evidence of publication by the defendant, and secondly, that the words were not capable of being read in a defamatory sense.

As to the first ground, the facts are not in dispute. The writing was placed in an envelope which was not closed or sealed, it was posted, and arrived in the ordinary course of post at the house where Mrs. Huth resided, and was opened and read

C. A. 1915

HUTH v. HUTH.

Bray J.

by the butler, and the first contention of the plaintiffs was that that constituted a publication by the defendant. It was a publication, but the question is whether it was a publication by the defendant, or one for which he was responsible. It appears quite clearly from the butler's evidence that he knew perfectly well that although the envelope was addressed to "Miss Edith Greaves," it was intended for his mistress, Mrs. Huth. Also there was nothing which entitled him, in the ordinary course of his duty, to open the envelope. He admitted that he did so from curiosity. There can be no doubt, in those circumstances, that the opening of the envelope, and the reading of its contents, was a wrongful act by the butler. In my opinion it is quite clear that, in the absence of some special circumstances, a defendant cannot be responsible for a publication which was the wrongful act of a third person. He cannot be said, except in special circumstances, to have contemplated it. It was not the natural consequence of his sending the letter, or writing, in the way in which he did. There are no special circumstances in the present case, and therefore, in my opinion, the publication, such as there was, to the butler was not a publication by the defendant, or a publication for which he could be made responsible.

It was also contended that the fact that the document was in an envelope unclosed was in itself some evidence from which a jury would be at liberty to infer that it was in fact published. But the only evidence that can be suggested is that a presumption of fact arises from the letter being sent in that way. What is a presumption of fact? A presumption of fact is one which arises from the high degree of probability of the existence of the fact. A familiar instance is where a man is charged with larceny, and is found in recent possession of the stolen goods. In that case there is a presumption of fact which affords evidence that the prisoner did in fact steal them, arising from the high degree of probability, which exists from his recent possession, that he did in fact steal them. Can there be such a presumption of fact in the present case? It is not analogous to a post-card or a telegram. A distinct act of taking its contents out of the envelope was required. Was there any presumption

of fact—was there any high degree of probability—that that would occur in the course of transmission from the defendant through the post to Mrs. Huth? In my opinion there was not. It is said that the Postmaster-General, or those deputed by him, have the right to open the envelope and read its contents in order to see if they are in accordance with the Post Office Regulations. I assume that. I have no doubt that it is so. But ought that to induce us to say that there is a high degree of probability that it would be so opened? On the contrary, it is the barest possibility, and the barest possibility will not do. In my opinion there is no such presumption of fact, and there being no evidence which would justify the jury in saying that the defendant was responsible for the publication to the butler, the learned judge was right in withdrawing the case on that point from the jury.

As to the other point I do not desire to say anything, but it must not be understood that I therefore am dissenting in any way from the learned judge's judgment.

Appeal dismissed. (1)

Solicitors for appellants: *Calder, Woods & Pethick, for Urry, Woods & Pethick, Ventnor.*

Solicitors for respondent: *G. F. Hudson, Matthews & Co., for Ragau Martin & Frend, Tunbridge Wells.*

(1) NOTE.—For reasons which are not material to the report no point was taken on behalf of the appellants as to whether an action would lie against the respondent in respect of the written address upon the envelope.

J. E. A.

1915
April 29;
May 14.

COLCHESTER BREWING COMPANY, LIMITED *v.* LICENSING JUSTICES FOR TENDRING DIVISION OF ESSEX.

Licensing Acts—Licence—Renewal—Reference to Compensation Authority—Evidence—Differentiation—Licensing (Consolidation) Act, 1910 (10 *Edw.* 7 & 1 *Geo.* 5, *c.* 24), *s.* 19.

The question of the renewal of the licence of an ante-1869 beerhouse was referred by the licensing justices to the compensation authority under s. 19 of the Licensing (Consolidation) Act, 1910, on the grounds that the house was unnecessary and that there was ample licensing accommodation in the district without it. Evidence was given before the compensation authority as to the situation, description, and trade of the house and of other licensed houses in the district and of their number. There was no evidence that the house compared unfavourably with the other houses in the district, and there was evidence that it was in some respects a better house than the licensed house, a beerhouse, situated nearest to it. The compensation authority refused the renewal of the licence:—

Held, that although there was no evidence that the house compared unfavourably with the other houses in the district, there was evidence on which the compensation authority was entitled to refuse the renewal of the licence.

Case stated by the Licensing Committee of the Court of Quarter Sessions for the county of Essex sitting as the compensation authority under the provisions of the Licensing (Consolidation) Act, 1910.

The appellants were the registered owners of an ante-1869 beerhouse known as the Princess Alexandra situate at Manningtree in the said county (hereinafter called "the said beerhouse").

On January 19, 1914, the respondents as the licensing justices for the district of Tendring, in which the said beerhouse was situate, caused to be served on the licensee thereof a notice of objection to the renewal of the existing on-licence in respect of the said beerhouse on the grounds "(1.) that the said licensed premises are unnecessary and (2.) that there is ample licensing accommodation near the said premises."

At the general annual licensing meeting for the district of Tendring on February 2, 1914, the licensee of the said beer-

house applied for the renewal of the licence, but the respondents as the licensing justices, being of opinion that the question of its renewal required consideration on grounds other than those on which the renewal thereof could be refused by them, decided to refer the matter to the quarter sessions under s. 19 of the Licensing (Consolidation) Act, 1910.

Accordingly on February 2, 1914, the said justices referred this matter and three other houses in the parish to the quarter sessions and reported thereon in the following terms:—

"That in our opinion the above houses are unnecessary, and that there is ample licensing accommodation in the district without them.

"The Princess Alexandra beerhouse, Manningtree.

"This is an ante-1869 beerhouse at Brook Street, Manningtree.

"Number of licensed houses in the parish, five full, three beer on, two beer off.

"The population of Manningtree in 1911 was 887, which equals one on licence to every 111 persons.

"Number of licensed houses

within 100 yards	None full.	None beer on.	None beer off.
„ 200 „	Two „	Two „	Two „
„ 300 „	Five „	Two „	Three „
„ 400 „	Six „	Three „	Three „

"Nearest licensed house:

"(*a*) Full. The Red Lion. 166 yards.

"(*b*) Beer on. The Swan. 120 „

"Character of neighbourhood, working class.

"Particulars as to the:—

"Situation and whether draw up. Situate at the top of Brook Street, Manningtree, and has no draw up.

"Accommodation. Four bedrooms, taproom, small smoke room, private sitting room, kitchen and underground cellar, stabling for six horses, coachhouse for two traps, yard and large garden.

"Structure. Brick and slate.

"Facilities for supervision (*a*) by police, good; (*b*) by licensee, good.

"State of repair. Fair.

BIBL. LONDIN UNIV.

1915

COLCHESTER BREWING COMPANY, LIMITED v. TENDRING LICENSING JUSTICES.

"Class of persons using house. Working classes.

"Comparison with nearest licensed house. This house compares favourably with the 'Swan,' which has less accommodation.

"Annual value for income tax, Schedule A, 22*l.*

"Trade, draught beer in average number of barrels per annum. About 210 barrels.

"Bottles, beer, average number of dozens per annum. About 520 pints.

"These are the figures supplied to the police by the licensee.

"The owners decline to supply the exact figures to enable the average to be arrived at.

"Annual rent paid by present tenant. 12*l.*

"Number of tenants of house during last five years. Two.

"Number of convictions during same period. None.

"The licensee works for the Tendring Hundred Water Company when required by them.

"The respondents, the said licensing justices, reported to the quarter sessions three other houses in the same parish, namely,

"The Packet.	Full licence
"The Forresters' Arms,	Beerhouse and
"The King's Head.	Full licence

but did not report the Swan."

At the hearing before the Licensing Committee of the Court of Quarter Sessions the above-mentioned report was put in evidence and considered by the committee, and Police Inspector Howlett verified the statements therein as to the number of licensed houses in the district, the character and population of the locality, and the respective distances of the said beerhouse and other licensed houses above referred to and their respective accommodation, except the Swan, and a plan showing the situation of all the licensed houses in the parish was produced and was attached to the case.

It was proved that the said beerhouse was the only licensed house situate at the top of the steep hill above Manningtree and that it was the most isolated as regards the proximity of other licensed premises in the parish, and evidence was given on

behalf of the licensee that the trade of the said beerhouse had continually increased during the past twenty years, and this was not cross-examined to. It was stated by Inspector Howlett, the only witness called by the respondents, that in his opinion there was a redundancy of houses in the parish, but that the said beerhouse suited the requirements of the neighbourhood; that it served a district of its own; that the nearest licensed house was the Swan above referred to and that it was a better house than the Swan, having recently been done up; and particulars of the trade for nearly the last three years, showing that the trade had increased in that period, were given.

No evidence other than that referred to in the preceding paragraph was given to differentiate the said beerhouse from any of the other licensed houses in the district.

It was objected on behalf of the licensee and registered owners that there was no evidence before the quarter sessions entitling them to refuse to renew the licence, but the Court, having heard the applications for renewal in respect of all four of the houses in the said parish referred to them before giving their decision in any case, refused the renewal of the licence of the said beerhouse, and also refused to renew the licences of each of the three other houses reported to them by the licensing justices.

The question for the opinion of the Court was whether there was any evidence before quarter sessions upon which they were entitled to and legally could refuse the renewal of the licence of the said beerhouse.

Walsh, K.C. (*Claughton Scott* with him), for the appellants. The compensation authority was not entitled to refuse to renew this licence unless there was evidence differentiating the house from the other houses in the neighbourhood: *Dartford Brewery Co.* v. *County of London Quarter Sessions.*(1) There was no evidence of differentiation, that is to say, there was no evidence that this house compared unfavourably with the other houses. The evidence was in fact the other way, for the case states that this house was better than the Swan. Evidence as to the number of houses in the district, and their respective distances,

(1) [1906] 1 K. B. 695.

1915

COLCHESTER BREWING COMPANY, LIMITED v. TENDRING LICENSING JUSTICES.

may be evidence that there are too many houses, but it is not evidence that a particular house is redundant. If several houses are referred to the compensation authority and it is impossible to differentiate between them, there is no evidence on which the compensation authority can act, and the licences of all of them must be renewed, just as in a case where no evidence is given on appeal by an objector to the renewal the licence must be renewed. [*Evans* v. *Conway Justices* (1), *Rex* v. *Southampton Licensing Justices* (2), *Morgan* v. *Aylesford Licensing Justices* (3), *Rex* v. *Shann* (4), and *Mitchell* v. *Croydon Justices* (5) were also referred to.]

Hohler, K.C. (*C. E. Jones* with him), for the respondents. The necessity for evidence of what has come to be called differentiation was first discussed in *Raven* v. *Southampton Justices* (6), but it was said by Lord Alverstone C.J. in that case that differentiation was only necessary in the absence of circumstances relating to any particular houses, and that where there are circumstances in connection with the character, position, or accommodation of a particular house which would justify the justices in thinking that that house was not required, it was not necessary to differentiate between that house and others. In *Rex* v. *Drinkwater* (7) Romer L.J. pointed out that the justices were not obliged to place all the houses in the district in an order of merit and select the lowest on the list for non-renewal. Therefore in the present case it is beside the point to say that the Princess Alexandra was a better house than the Swan. There was evidence before the compensation authority as to the position, accommodation, and character of this house and of the other houses in the district, and that this house was an ante-1869 beerhouse, whereas there was a fully-licensed house, the Red Lion, within 160 yards of it. There was, therefore, evidence on which the justices could come to the conclusion that the Princess Alexandra was not required, it not being disputed that the number of houses

(1) [1900] 2 Q. B. 224.
(2) [1906] 1 K. B. 446.
(3) [1906] 1 K. B. 437.
(4) [1910] 2 K. B. 418.
(5) (1914) 111 L. T. 632.
(6) [1904] 1 K. B. 430.
(7) (1905) 70 J. P. 1.

in the parish was excessive: *Howe* v. *Newington Licensing Justices.* (1)

[LORD COLERIDGE J. referred to *Rex* v. *Tolhurst.* (2)]

Walsh, K.C., replied.

Cur. adv. vult.

May 14. The following written judgments were delivered:—

LORD READING C.J. The appellants are the owners of an ante-1869 beerhouse, the Princess Alexandra. The licensing justices for the district referred the matter of the renewal of the licence of this house and of three other houses in the district to the Licensing Committee of the Court of Quarter Sessions acting as the compensation authority and reported that, in the opinion of the justices, the Princess Alexandra and the three other houses in the district were unnecessary and that there was ample licensing accommodation in the district without them. At the hearing before the compensation authority evidence was given in support of the statements in the report of the justices as to the number of licensed houses in the district, the character and population of the locality, and the respective distances of the Princess Alexandra and other houses in the district, and of their respective accommodation, except the Swan, which was also an ante-1869 beerhouse within the district, and a plan was proved showing the situation of all the licensed houses in the district. The evidence established that there was a redundancy of licensed houses in the district, but that the Princess Alexandra was a better house than the Swan; it was in a better condition and had an increasing trade. The compensation authority refused to renew the licence of the Princess Alexandra and the licences of the other three houses.

The question submitted for the opinion of this Court is whether there was any evidence upon which the compensation authority could refuse the renewal of the licence of the Princess Alexandra. If there was evidence upon which they could act, it is not suggested that there is any ground for challenging the exercise of their discretion; but it is contended on behalf of

(1) [1907] 2 K. B. 340. (2) [1905] 2 K. B. 478.

1915

COLCHESTER BREWING COMPANY, LIMITED v. TENDRING LICENSING JUSTICES.

Lord Reading C.J.

the appellants that they had no evidence before them to justify the selection of this particular house, in preference to other houses in the district, as the house to be closed because of redundancy. The redundancy was not in dispute, but it was urged that as there was no evidence that the Princess Alexandra stood lower in order of merit than other houses in the district, and, indeed, as it was proved that at least it stood higher in order of merit than the Swan, the magistrates could not refuse the renewal.

The proposition of law is that the magistrates could not close a house on account of redundancy of licensed houses in the neighbourhood unless they were satisfied by the evidence that that house compared unfavourably with other houses in the district. There is no language in the statute to support this proposition and, in my opinion, it is not established by any of the authorities cited to us. Indeed the judgment of Romer L.J. in *Rex* v. *Drinkwater* (1) is in direct opposition to it. In *Raven* v. *Southampton Justices* (2) it was decided that the magistrates could not select the houses to be closed upon the evidence alone of a map of the district. Lord Alverstone C.J. said (3): "There may be circumstances in connection with the character of the house, with its position or accommodation, which would justify the magistrates in thinking that that house, having regard to all the circumstances, is not required in the neighbourhood, and they may act accordingly." The reason for the decision in that case was that there was no such evidence. In the present case there is, in addition to the plan produced, other evidence to which I have already directed attention and which in my judgment was sufficient to entitle the magistrates to close the Princess Alexandra. They did not act capriciously; they only arrived at their conclusion after exercising their judgment in reference to the various houses and upon the evidence submitted to them. There is a wide discretion entrusted to them by Parliament, and I am not inclined to go further in the direction of limiting their powers in the exercise of their honest judgment.

The effect of the appellants' contention, if it prevailed, would

(1) 70 J. P. at p. 4. (2) [1904] 1 K. B. 430.
(3) [1904] 1 K. B. at p. 441.

be to hamper the compensation authority in some districts and to a material degree, for where the compensation fund is small, and there is a number of small houses, each of which would be within the limits of the compensation then available, none of such houses could be closed so long as there were larger houses in the neighbourhood which compared unfavourably with them, notwithstanding that the funds available were insufficient to enable the compensation authority to close the larger houses. I think such a result must be contrary to the intention of Parliament as manifested by the language of the statute.

In my judgment the appeal must be dismissed with costs.

LORD COLERIDGE J. In this case the respondents refused the licence of the Princess Alexandra beerhouse at Manningtree, and referred the same for compensation to the licensing committee sitting as compensation authority at quarter sessions on the ground of redundancy. Three other houses were at the same time referred, and in all four cases the renewal of the licences was refused. Redundancy in general was not contested, but it was urged that no sufficient, or indeed any, evidence was given for selecting the particular house for redundancy. There was evidence before the licensing committee that the nearest licensed house to the Princess Alexandra beerhouse was the Swan, also a beerhouse, and that the Princess Alexandra was in many respects a better house. The Swan was not among those referred for compensation. Evidence was given of the number of licensed houses in the district, of the character and population of the locality, and the respective distances of the Princess Alexandra public-house and other public-houses.

The statute says nothing about differentiation, but this phrase has been used in various decisions on the Act, and in the case of *Dartford Brewery Co.* v. *County of London Quarter Sessions* (1) it was held that the licensing committee could not act without some evidence of differentiation; and in *Raven* v. *Southampton Justices* (2) that merely looking at a map will not suffice. I am not sure that differentiation is a very happy term to use. I would rather put it that the licensing committee must have some

(1) [1906] 1 K. B. 695. (2) [1904] 1 K. B. 430.

1915

COLCHESTER BREWING COMPANY, LIMITED v. TENDRING LICENSING JUSTICES.

Lord Coleridge J.

evidence before them that the particular licence was redundant. Such evidence is not displaced by showing that some other house ought likewise to go.

When once there is evidence that the particular house is redundant there is nothing to interfere with the discretion honestly exercised by the licensing committee. There may be many reasons for choosing one house rather than the other when both are redundant. For instance, questions of finance may enter into it. If the licensing committee have before them, as they had here, evidence of character and population, of locality, respective distances of other houses, evidence that the house selected was an ante-1869 beerhouse, they have ample material upon which to form a judgment that the particular licence was redundant. We do not review the wisdom of their decisions founded upon evidence and arrived at with honesty.

If they have on these materials arrived at a decision it is not a ground for interfering with it to urge that some other house whose licence remains was equally redundant, and that there are circumstances to show that such other house ought to have been selected in preference. This was clearly laid down by Romer L.J. in *Rex* v. *Drinkwater*. (1) He says: "It is not necessary for the compensation authority to be obliged to ascertain by strict evidence what sort of order of merit exists between the various public-houses, and having placed them in the order of merit, to be obliged to select that which is the lowest on the list. . . . . The number of considerations which might induce, and properly induce, the compensation authority to select one for sacrifice rather than another is so numerous and so diversified that it would be impossible to lay down any principle upon which an order of merit could be arrived at. The compensation authority ought not to be hampered in any such way. Their duty has been pointed out to them, and it is sufficient if they, having evidence before them that there are too many public-houses, come to the conclusion, after going into the circumstances connected with the various public-houses, and in particular of the public-house of which they think the

(1) 70 J. P. at p. 4.

licence should not be renewed, and having evidence before them which satisfies them that in the interests of the public the licence of the particular house they are going to sacrifice ought not to be renewed, they act accordingly and award compensation accordingly."

On these grounds I am of opinion that the decision of the licensing committee must stand.

AVORY J. The question submitted to the Court in this case is whether there was any evidence upon which the Court of Quarter Sessions, sitting as the compensation authority, could legally refuse to renew the licence of the beerhouse known as the Princess Alexandra. I have had the advantage of reading the judgment of my brother Coleridge, and unless the Court is prepared to adopt the contention of Mr. Walsh for the appellants that to justify the refusal to renew in such a case as the present there must be evidence unfavourable to the house in question as compared with other licensed houses in the neighbourhood, I am constrained to come to the same conclusion.

In the previous decisions that have been referred to in which the expression "differentiation" has been used, I think it appears that evidence of this nature has been or should be given, but I find it impossible to say that the compensation authority may not upon evidence as to the situation, description, and trade of a particular licensed house, and of the number and situation of the other licensed houses in the district, honestly decide that it is unnecessary for the wants of the neighbourhood, even though it may compare favourably with some other licensed house or houses in the neighbourhood, and nothing can be said to its detriment except that it is unnecessary. I think the decisions when examined only come to this, that the compensation authority, sitting in a judicial capacity, cannot, because they come to the conclusion that there are too many licensed houses in their district, select one or more haphazard for sacrifice.

In the case of *Rex* v. *Drinkwater* (1) the Master of the Rolls said that the house was distinguished in the sense of making

(1) 70 J. P. 1.

1915

COLCHESTER BREWING COMPANY, LIMITED v. TENDRING LICENSING JUSTICES.

Avory J.

it less desirable that the licence should be renewed, and Mathew L.J. said he decided on the further ground that "this house has become less suitable and less convenient to the public than the others." It was not necessary in that case to decide the point raised in the present appeal, but the passage from the judgment of Romer L.J. quoted by my brother Coleridge appears to be conclusive against the contention of the appellants, and in *Raven* v. *Southampton Justices* (1) Lord Alverstone C.J. said: "It by no means follows that it is necessary to differentiate between different houses because the justices are going to refuse, or think they ought to refuse, a particular licence on the ground that the licence is not required. There may be circumstances in connection with the character of the house, with its position or accommodation, which would justify them in thinking that that house, having regard to all its circumstances, is not required in the neighbourhood."

I should have been more satisfied if the justices had given some reason for deciding that this particular house was not required, but I am unable to say there was no evidence upon which they could so decide in the exercise of a judicial discretion.

Appeal dismissed.

Solicitors for appellants: *Boxall & Boxall, for Thompson Smith & Son, Colchester.*

Solicitors for respondents: *Doyle, Devonshire & Co., for Jones & Son, Colchester.*

(1) [1904] 1 K. B. at p. 441.

F. O. R.

TRATT *v.* GOOD.

1915
May 14.

Licensing—Licence Duty—Right of Lessee to recover Increase of Duty from Lessor—Jurisdiction of County Court—Finance Act, 1912 (2 & 3 *Geo.* 5, *c.* 8), *s.* 2.

By s. 2 of the Finance Act, 1912, the lessee of licensed premises may under the circumstances therein specified "recover as a debt due from . . . . the grantor of such lease . . . . so much of any increase of the duty payable in respect of the licence under the provisions of the Finance (1909-10) Act, 1910, as may be agreed upon as proportionate to any increase of rent . . . . payable in respect of the premises being let as licensed premises, and, in default of agreement, the amount proportionate to such increased rent . . . . shall be determined . . . . by a county court":—

Held, that the jurisdiction of the county court under that section was confined to determining the amount, and did not extend to the determination of the existence of the circumstances under which the liability of the grantor arose, or to the giving of judgment for the recovery by the lessee of the amount when determined.

Appeal from a judge at chambers refusing a writ of prohibition to a county court.

The action was brought in the Bow County Court under s. 2 of the Finance Act, 1912 (1), the particulars of demand being as follows:—

1. The plaintiff is the lessee of and holds the Little Driver public-house, situate in Bow Road in the county of London,

(1) By s. 2 of the Finance Act, 1912, "Where the licensed premises are held under a lease or agreement for lease made before the passing of the Finance (1909-10) Act, 1910, which does not contain or import any covenant, agreement, or undertaking on the part of the lessee under such lease or agreement for lease to obtain a supply of intoxicating liquor from the grantor of the lease or agreement for lease, the lessee under such lease or agreement for lease shall be entitled, notwithstanding any agreement to the contrary, to recover as a debt due from, or deduct from any sum due to, the grantor of such lease or agreement for lease so much of any increase of the duty payable in respect of the licence under the provisions of the Finance (1909-10) Act, 1910, as may be agreed upon as proportionate to any increased rent or premium payable in respect of the premises being let as licensed premises, and, in default of agreement, the amount proportionate to such increased rent or premium shall be determined in manner directed by rules of court by a county court."

1915

TRATT v. GOOD.

under a lease dated October 13, 1896, of which the defendant was the grantor.

2. The said lease does not contain or import any covenant, agreement, or undertaking on the part of the lessee under such lease to obtain a supply of intoxicating liquor from the grantor of the lease.

3. The said lease was made between the defendant Edward Good of the one part and one Eleanor Flower of the other part.

4. The said lease was granted in consideration of a premium of 32,050*l.* and of a rent of 225*l.* per annum.

5. The said lease was for a term of seventy years from June 24, 1896.

6. By an assignment dated March 19, 1912, and made between Barclay, Perkins & Co., Limited (the mortgagees of the said lease by virtue of a mortgage dated October 13, 1896), of the first part, the defendant of the second part, the said Eleanor Flower of the third part, and the plaintiff of the fourth part, the said lease became vested in the plaintiff.

7. The plaintiff is and at all material times was in occupation of the said public-house, and holds and held the licence enabling him to sell intoxicants for consumption on the said premises.

8. The duty payable in respect of the licence of the said premises prior to the Finance (1909-10) Act, 1910, was 60*l.* The duty now payable under the provisions of that Act is 254*l.*, and the increase of the duty payable in respect of the said licence is consequently 194*l.*

9. The rental value of the premises unlicensed is and at all material times was 150*l.*

10. The equivalent in annual payment for the said premises of 32,050*l.* on the 5 per cent. tables for the period of the said lease is the annual sum of 1656*l.*

11. If the said annual sum of 1656*l.* be added to the said rent of 225*l.* the result gives a rent and annual premium-equivalent of 1881*l.* for the said public-house. If the estimated rent of the said premises unlicensed, that is to say 150*l.*, be deducted from the said sum of 1881*l.*, the result, 1731*l.*, is the increased rent and annual premium-equivalent payable in respect of the premises being let as licensed premises.

1915

TRATT v. GOOD.

12. The plaintiff claims that the amount of the increase in the licence duty as aforesaid proportionate to the increased rent or premium payable in respect of the said premises being let as licensed premises which he is entitled to recover as a debt due from, or deduct from any sum due to, the defendant shall be determined to be the sum of 178*l.* per annum or $\frac{1731}{1881}$ths of 194*l.*

13. Since August 7, 1912, the plaintiff has neither deducted nor recovered any sum from the defendant in respect of the matters aforesaid, nor has the proportion been agreed between the plaintiff and the defendant.

And the plaintiff claims a determination by the Court of how much of the said increase of duty he is entitled to recover as a debt due from the defendant to him, or to deduct from any sum due from him to the defendant, and claims to recover or deduct in respect of the said increase of duty paid by him for the years

	£
1912-13	178
1913-14	178
1914-15	178

or in all for the three years 534*l.*

The defendant, upon service of the particulars of demand, applied to Coleridge J. in chambers for a writ of prohibition to the county court judge in the matter of the action, upon the ground, amongst others, that an assignee of a lease is not a lessee within the meaning of the section, and that, the title of the plaintiff to sue being disputed, the county court had no jurisdiction. The judge refused the application. The defendant appealed.

Gordon Hewart, K.C., and *Zeffertt*, for the appellant. Under s. 2 of the Finance Act, 1912, the county court has no jurisdiction to do anything beyond determining the amount to be paid by the defendant where the amount is in dispute. It cannot adjudicate upon the question of the defendant's liability. It cannot even determine the amount unless it be admitted that the premises are held under a lease made before 1910, that the

1915

TRATT v. GOOD.

lease does not contain a covenant tying the house, and that the plaintiff is the lessee, for the existence of those facts is a condition precedent to the county court's exercising jurisdiction at all. Where that condition precedent is not satisfied that Court cannot give judgment for the amount when determined, even if it should be within the limit of its ordinary jurisdiction, that is to say less than 100*l.*, whereas here the amount claimed largely exceeds that sum. Here the plaintiff's title to sue is disputed, for he alleges that he is assignee of the lease under which the premises are held, and it is contended that an assignee is not a lessee within the meaning of s. 2. It has already been held that the "grantor of the lease" from whom the money is to be recovered means the original grantor only, and does not include a person who for the time being is in receipt of the rent of the demised premises: *Bodega Co.* v. *Read.* (1) That shows that the section is to be construed strictly. Then if this Court is satisfied that the county court judge would be exceeding his jurisdiction if he entertained the case, it is bound to issue a writ of prohibition; the writ in such a case is a matter of right, not of discretion: *Worthington* v. *Jeffries.* (2)

Ryde, K.C., and *Wootten*, for the respondent. The section creates a statutory debt and prescribes the only tribunal before which it is recoverable. It was meant to provide a cheap means of recovering the amount, if any, that is recoverable, and no limit was imposed as to the amount. In *Watney, Combe, Reid & Co.* v. *Berners* (3), where an action was brought in a county court under the same section by a lessee who had sub-let the premises and was not himself the holder of the licence, the question was whether under those circumstances the lessee was entitled to sue. The case was carried up to the House of Lords, but it never occurred either to the defendant's counsel or to any judge in any one of the three Courts to take the point that the county court judge had no jurisdiction, though it would have afforded a short way of disposing of a difficulty. If the defendant's contention is right the result will be that in such a case as the present three different proceedings

(1) [1914] 2 Ch. 283. (2) (1875) L. R. 10 C. P. 379.
(3) [1914] 3 K. B. 288.

will have to be taken: first the plaintiff will have to go to the High Court to determine the question of liability, then to the county court to determine the amount, and then back to the High Court to recover the amount so determined. It can hardly have been intended to require such an unnecessary number of proceedings.

[SANKEY J. On the other hand if you are right, then if the amount is agreed and is in excess of 100*l.* the tribunal for its recovery must be the High Court, whereas if the amount is not agreed the tribunal will be the county court. That would be a strange result.]

In *Stannard* v. *St. Giles, Camberwell* (1) Jessel M.R. said: "Where the Legislature has pointed out a mode of proceeding before a magistrate it is not, as a general rule, for another Court to interfere to stop that proceeding by injunction"; and the same observation must apply to prohibition. According to the defendant's construction of the section the county court would be confined to giving a declaration of right, so far as the amount was concerned, without giving any consequential relief, and the presumption, as was pointed out by Lord Davey in *Barraclough* v. *Brown* (2), is against the Legislature ever so intending. No doubt the county court cannot finally decide the question of liability, but it would seem a reasonable thing that it should do so provisionally subject to appeal. In *Rex* v. *Bradford* (3) it was held under s. 54 of the Highway Act, 1835, which says that the surveyor may by licence from the justices get materials for repair of the highways from enclosed lands "such lands . . . . not being . . . . a park," that the justices could not give themselves jurisdiction by wrongly finding that the place was not a park. But Bray J. said: "The justices must first of all inquire whether the place is a park or not," although "that inquiry is not in the course of the exercise of the jurisdiction, but as a preliminary to it."

Hewart, K.C., in reply. The meaning of the words "the amount . . . . shall be determined" is clear when one refers to s. 46 of the Finance (1909-10) Act, 1910, which provides

(1) (1882) 20 Ch. D. 190, at p. 196. (2) [1897] A. C. 615, at p. 623.
(3) [1908] 1 K. B. 365.

1915

TRATT v. GOOD.

that in the case of a tied house the licence holder may recover as a debt so much of the increase of duty as is "in default of agreement determined by the Commissioners to be proportionate to any increased rent." That shows that the county court is to determine the amount and nothing more, for the words must have the same meaning in the two sections.

LUSH J. In this case the action is brought by a person who alleges that he is the lessee of a certain licensed house against the person who is alleged to be the grantor of the lease. It is brought in the county court to obtain a determination of the amount of the increase of duty which he is entitled to recover under s. 2 of the Finance Act, 1912, from the defendant, and to recover that amount when so determined, and the plaintiff claims that the proper amount is 534*l*. The plaint having been issued the defendant applied to Coleridge J. at chambers for a writ of prohibition upon the ground that if the county court judge proceeded to deal with the case he would be exceeding his jurisdiction. Coleridge J. refused the application, and from that refusal this appeal has been brought. Now the ground upon which the right to prohibition is asserted is this: by s. 2 of the Finance Act, 1912, provision is made to enable the lessee of a licensed house to recover from the lessor so much of the increase of duty on the licence as they may agree to be proportionate to the increase of the rent due to the fact of the premises being licensed, and in default of agreement the amount is to be determined by a county court. It is said on behalf of the defendant that the county court judge under that section has authority only to determine the amount; whereas the plaintiff here is asking him not merely to determine the amount but also to decide whether any sum is payable at all; and the defendant contends that the question of liability is not one which the county court judge has any jurisdiction to entertain. Now when one looks at that section it is I think reasonably clear that what it means is this, that if certain conditions are fulfilled, namely, if the licensed premises are held under a lease made before the passing of the Finance (1909-10) Act, 1910, and if the lease does not contain a covenant of the kind mentioned in the section, in

that case and in that case only the lessee can recover as a debt from the lessor a sum which is to bear a certain proportion to the increased rent that he has to pay in consequence of the premises being licensed. When those conditions are fulfilled and the parties fail to agree upon the amount, the county court judge has power to determine the amount. But if the defendant in addition to disputing the amount contends that he is under no liability to the plaintiff at all, I can see nothing in the section giving the county court judge power to adjudicate upon that latter question. Yet that is what the plaintiff here in his particulars of claim is inviting the judge to do. He is asking him to say that the conditions, upon the fulfilment of which his jurisdiction depends, have been fulfilled, and to give judgment for the plaintiff for the sum which he says the defendant is liable to pay. In my opinion that question of the fulfilment of the conditions is not an inquiry upon which the county court judge has any jurisdiction to embark. Under those circumstances I think this is a case in which we ought to say that the defendant is entitled to the prohibition claimed.

SANKEY J. I agree. The plaintiff by his particulars of demand claims two things, first a determination by the county court judge as to how much of the increase of duty he is entitled to recover from the defendant, and secondly judgment for the recovery of that sum. The question falls for determination under s. 2 of the Finance Act, 1912. That section says that a plaintiff may recover as a debt a certain sum when (1.) there is a particular relationship between him and the defendant, and (2.) there is either an agreement as to the amount between him and the defendant, or a determination of the amount by a county court. In my view that section gives the county court judge jurisdiction only to settle the amount, it gives him no jurisdiction to deal with the question of liability. I am confirmed in that view by the fact that the same word "determined" is used in s. 46 of the Finance (1909-10) Act, 1910, which contains a corresponding provision for the recovery by the licensee of a proportion of the increased duty in cases in which he is bound by a covenant to obtain a supply of liquor from a particular

1915

TRATT v. GOOD.

Sankey J.

person. It provides that the licensee may "recover as a debt . . . . so much of any increase of the duty . . . . as may be agreed upon, or in default of agreement determined by the Commissioners." It is clear that the Commissioners can have no jurisdiction to adjudicate upon any question of liability, and presumably the word "determined" must be given the same meaning in both sections. As therefore it appears from the particulars of demand that the plaintiff is asking the county court judge to do something which he has no jurisdiction to do, I think that prohibition ought to issue.

Appeal allowed.

Solicitors for appellant: *Loxley, Elam & Gardner.*
Solicitors for respondent: *Marson & Toulmin.*

J. F. C.

1915

June 9, 11.

WALL *v.* REDERIAKTIEBOLAGET LUGGUDE.

Charterparty—Construction—Penalty Clause or Limitation of Liability.

A charterparty contained the following clause: "Penalty for non-performance of this agreement proved damages, not exceeding estimated amount of freight":—

Held, that the clause provided a penalty and not a limitation of liability, and did not prevent the party complaining of non-performance from recovering the actual damages though exceeding the estimated amount of freight.

TRIAL before Bailhache J. without a jury.

By a charterparty dated June 5, 1914, the defendants, being owners of the steamship *Atos*, described as "now trading and expected ready to load between January 1 and 31, 1915," chartered her to the plaintiffs to proceed to Goole and there load a cargo of coal not exceeding 1050 tons nor less than 950 tons and proceed therewith to Oporto and there deliver it on being paid freight at the rate of 7*s.* 6*d.* per ton. By clause 15 of the charterparty it was provided as follows: "Penalty for non-performance of

this agreement proved damages, not exceeding estimated amount of freight." The contract also provided that "This charter to remain in force for three consecutive voyages commencing between 1st and 31st January, 1915." In January, 1915, the defendants refused to carry out their contract, or to allow their ship to sail on any of the three voyages stipulated for. It was then too late for the plaintiffs to get a substituted ship for the coal which they held for January shipment. The lowest rate of freight at which it might have been possible to secure a substituted ship was about four times the amount of the chartered rate. For the February and March shipments the plaintiffs succeeded in chartering two other ships in substitution for the *Atos*, but at rates far in excess of the chartered rate. The action was brought to recover the actual amount of the loss which the plaintiffs had suffered in consequence, which sum was agreed between the parties at 3000*l.* The defendants, who admitted liability, paid into Court the sum of 1125*l.* as being the estimated amount of freight on cargoes of 1000 tons each on three voyages at 7*s.* 6*d.* per ton, and said that under clause 15 the plaintiffs' right of recovery was limited to that sum.

MacKinnon, *K.C.*, and *R. A. Wright*, for the plaintiffs. If, as the plaintiffs contend, clause 15 of the charterparty, on which the defendants rely, is a penalty clause, the plaintiffs are entitled to disregard it and to sue for the damage they have actually sustained although it exceeds the estimated amount of freight. In *Lowe* v. *Peers* (1) Lord Mansfield stated the law to be that where a contract provided a penalty for its breach the obligee has an election to bring an action of debt for the penalty or to sue for damages. If he adopts the former alternative he cannot recover judgment for more than the penalty even though the damage which he has actually sustained exceeds it in amount. If he adopts the latter he is under no such restriction. The rule was similarly stated in *Winter* v. *Trimmer* (2), where it was held that a plaintiff may recover more than the penalty of a charterparty in damages if he elects to sue by action on the case for breach of contract instead of on the penalty. In

(1) (1768) 4 Burr. 2225, at p. 2228. (2) (1763) 1 W. Bl. 395.

1915

WALL v. REDERI-AKTIE-BOLAGET LUGGUDE.

Harrison v. *Wright* (1) a charterparty contained a clause "Penalty for non-performance 1300*l*." The plaintiff claimed damages in excess of that amount, and it being found that the damage actually suffered was 1860*l*., he was held entitled to recover that sum, and was not limited to the amount of the penalty. In *Hurst* v. *Hurst* (2) Parke B. cited Lord Mansfield's statement of the law with approval. In *Godard* v. *Gray* (3) an action was brought in a French Court upon an English charterparty containing a penalty clause in the common form "Penalty for the non-performance of this agreement estimated amount of freight," and the Court having treated the clause as fixing the damages recoverable, it was held in an action in the English Court on the French judgment that the defendant could not dispute the decision upon the ground that it was based on a mistake as to the English law; at the same time the English Court recognized that it was based on a mistake, and Blackburn J. cited with approval a passage from Abbott on Shipping where it is said: "Such a clause is not the absolute limit of damages on either side; the party may, if he thinks fit, ground his action upon the other clauses or covenants, and may, in such action, recover damages beyond the amount of the penalty, if in justice they shall be found to exceed it. On the other hand, if the party sue on such a penalty clause, he cannot, in effect, recover more than the damage actually sustained." But it will be said on the other side that this is not a penalty clause at all, but a limitation of liability. The answer to that is that in the first place the parties have chosen to call it a penalty; and that, though not conclusive, goes a long way to show that they meant it to be a penalty. Further, it in fact operates as a penalty clause in all cases in which the actual loss is greater than the estimated amount of freight. If the effect of it is to fix a definite sum by way of compensation for varying degrees of damage it is a penalty clause, and it is not the less so because it does not come into operation until a particular standard of damage has been reached. Further, a clause referring to the amount of the freight as the measure of the

(1) (1811) 13 East, 343. (2) (1849) 4 Ex. 571.
(3) (1870) L. R. 6 Q. B. 139.

damages recoverable cannot reasonably be regarded as liquidating the damages in an action by the charterer, for, as was pointed out by Lord M'Laren in *Stroms Bruks Aktie Bolag* v. *Hutchison* (1), "in general a claim of damages will not be held to be liquidated unless there is some intelligible relation between the specified penalty and the damage which may be or has been sustained"; and the "estimated amount of freight . . . . is not a measure that can be applied to the case of a breach of contract by the shipowner, because what the merchant suffers by such a breach is not a loss of freight, or of anything corresponding to freight, but the loss of profit on a resale, or the loss of the use of the goods for the purposes of his business." And here the action is by the charterers.

Secondly, assuming that the plaintiffs are wrong in contending that this clause is not a limitation of liability, the defendants cannot rely on it, for they refused to perform their contract altogether, and having done so they cannot afterwards claim the benefit of the limitation. In *Jureidini* v. *National British and Irish Millers Insurance Co.* (2) a claim was made for indemnity for the loss of goods by fire under a policy the conditions of which provided (1.) that if the claim was fraudulent all benefit under the policy should be forfeited, and (2.) that any difference as to the amount of loss should be referred to arbitration and the obtaining of the award of the arbitrator should be a condition precedent to any right of action on the policy. The insurance company repudiated the claim on the ground of fraud. It was held that the repudiation of the claim on a ground going to the root of the contract precluded the company from pleading the arbitration clause as a bar to an action to enforce the claim. Lord Haldane at p. 503 referred to a dictum of Lord Shaw in a Scotch case that "It does not appear to me to be sound law to permit a person to repudiate a contract and thereupon specifically to found upon a term in that contract which he has thus repudiated."

Roche, K.C., and *Neilson*, for the defendants. The clause in question merely provides a limitation of liability; it is not a penalty clause which can be disregarded. A similar clause was

(1) (1904) 6 F. 486, at p. 493. (2) [1915] A. C. 499.

1915

WALL v. REDERI-AKTIE-BOLAGET LUGGUDE.

discussed in *Dimech* v. *Corlett*. (1) There the charterparty provided that "the penalty for non-performance of this agreement to be the amount of freight"; and the charterer having wholly refused to provide any cargo the question arose as to what damages he was to pay. The Privy Council held that it could not have been intended that the whole amount of freight should be forfeited for a breach however trivial, and that the meaning of the clause was that "for any minor breach the damages to be recovered within the amount of freight are the damages actually sustained," and that "in case of an entire non-performance, such as a neglect or refusal to put any cargo on board so that no freight could be earned, the parties had agreed that the damages should be the full amount of freight stipulated for in the instrument." In other words they held that the expression "non-performance" meant "total non-performance," and that under such a clause the plaintiff might always recover the damage actually sustained not exceeding the amount of the freight. It is true that in the present case after the words "penalty for non-performance of this agreement" there occur the additional words "proved damages." But the effect of that addition is only to express in terms the construction which the Privy Council had already put upon the clause without those words. That case is therefore a direct authority upon the meaning to be given to the clause in the present case. In *Godard* v. *Gray* (2) no doubt Blackburn J. expressed the opinion that such a clause was not a limitation of damages; but that dictum was obiter only, it was unnecessary to the decision. Moreover the question of what the English law was upon the subject was not there discussed by counsel, and *Dimech* v. *Corlett* (3) was not referred to. As to the second point, in *Jureidini's Case* (4) there was a repudiation of the claim which went to the root of the contract. Here there has been no repudiation of the contract, but only an excuse for non-performance upon the ground that the defendants were compelled to act as they did by a restraint of princes, and

(1) (1858) 12 Moo. P. C. 199, at p. 230.
(2) L. R. 6 Q. B. 139.
(3) 12 Moo. P. C. 199.
(4) [1915] A. C. 499

that affords no reason for visiting their action with penal consequences.

MacKinnon, K.C., in reply.

Cur. adv. vult.

June 11. BAILHACHE J. read the following judgment:—This is an action by charterers against shipowners for damages for the admittedly wrongful refusal of the owners to perform their part of a charterparty dated June 5, 1914. The charterparty was one for three consecutive voyages of the steamship *Atos* with coal from Goole to Oporto, the first voyage to begin in January, 1915. The owners in January declined, upon a ground which they do not now support, to make any of the voyages, and have paid into Court in satisfaction of the charterers' damages 1125*l.* It is admitted that the actual damages suffered by the charterers amount to 3000*l.*, but the owners claim that they are not liable for more than the sum paid in by them, and for this they rely on clause 15 of the charterparty, which runs thus: "Penalty for non-performance of this agreement proved damages, not exceeding estimated amount of freight." The owners contend that the clause is a limitation of liability clause and is effective only to limit their liability to the estimated amount of freight which would become payable to them had the charterparty been performed. If this contention is right the owners have paid enough into Court. The charterers contend that clause 15 is a penalty clause which they may disregard. If this construction is right the sum claimed by the charterers is due to them. I have to decide between these two contentions.

Voyage charterparties have in countless instances and for very many years contained a clause which has always been called a penalty clause. The commonest form of that clause has been "Penalty for non-performance of the agreement estimated amount of freight." The clause in this form is obviously and admittedly a penalty clause. Many charterparties have in recent years contained a limitation of liability clause. The form of this clause varies considerably, but is substantially like the clause in *Baxter's Leather Co.* v. *Royal Mail Steam Packet Co.* (1), that

(1) [1908] 2 K. B. 626.

1915

WALL v. REDERI-AKTIE-BOLAGET LUGGUDE.

Bailhache J.

"the masters owners or agents . . . . shall not be accountable . . . . for any goods of whatever description beyond the amount of 2*l.* per cubic foot for any one package . . . . unless shipment be made upon a special order containing a declaration of the value . . . . and extra freight as may be agreed upon be paid." Clause 15 in the present charterparty is in point of form very like the common penalty clause and unlike the limitation of liability clause, but the owners say that, as the effect of it is that the charterers can only recover proved damages, and further to limit liability to the estimated amount of freight when the damages exceed that sum, I must treat clause 15 as a limitation and not as a penalty clause. Now where a contract contains a clause which is in form indisputably a penalty clause the position of the parties was thus described by Lord Mansfield in *Lowe* v. *Peers* (1): "There is a difference between covenants in general, and covenants secured by a penalty or forfeiture. In the latter case the obligee has his election. He may either bring an action of debt for the penalty, and recover the penalty; (after which recovery of the penalty he cannot resort to the covenant, because the penalty is to be a satisfaction for the whole;) or, if he does not choose to go for the penalty, he may proceed upon the covenant, and recover more or less than the penalty toties quoties." This as a general statement of the law is no doubt correct, but when one goes into the matter more closely one must qualify it by reference to the Act of 8 & 9 Will. 3, c. 11, the effect of which statute is that in an action upon a bond (and this includes a penalty clause in a contract) conditioned for the performance of a contract the plaintiff must assign a breach, or as many breaches as he thinks fit, of the condition, and though he is entitled on proving a breach to judgment for the full amount of the penalty he can only recover by execution the amount of the damages proved to have been sustained by the breach or breaches assigned. The result of suing for the penalty is therefore that the plaintiff recovers proved damages, but never more than the penal sum fixed: see *Hardy* v. *Bern* (2); *Branscombe* v. *Scarbrough* (3); *Dimech* v. *Corlett.* (4) The right to sue either for the penalty

(1) 4 Burr. at p. 2228.
(2) (1794) 5 T. R. 636.
(3) (1844) 6 Q. B. 13; 13 L. J. (Q.B.) 247.
(4) 12 Moo. P. C. 199.

or damages for breach of contract disregarding the penalty, or in archaic phraseology to sue in debt or in assumpsit, is again expressly asserted by Lord Ellenborough in *Harrison* v. *Wright.* (1) That was an action in assumpsit on a charterparty containing the clause "Penalty for non-performance 1300*l.*," a clause not distinguishable in legal effect from the clause "Penalty for non-performance estimated amount of freight." Lord Ellenborough says at p. 348: "The penalty therefore is auxiliary to the enforcing performance of the contract; and the party grieved may either take the penalty as his debt at law and assign his breach under the statute of William; or he may bring his action for damages upon the breach of the contract," and he adds the important words "Though to be sure the advantage of taking judgment for the penalty as the debt at law is very much cut down by the statute of King William." The operation of that statute I have already described.

This being the state of the law as I understand it, one easily sees why in charterparty cases no one sues on the penalty clause now. You cannot under it recover more than the proved damages, and if the proved damages exceed the penal sum you are restricted to the lower amount. As the penalty clause may be disregarded it always is disregarded and has become a dead letter, or from another point of view a "brutum fulmen," as Blackburn J. called it in *Godard* v. *Gray.* (2) On p. 147 he cites a passage from the 5th edition of Abbott on Shipping, who says quite clearly and shortly what I have been expressing at great length.

There is just one possible exception to the rule that where a plaintiff sues in debt for a penal sum he must prove his damages, and that is where the breach relied upon is complete failure to perform any part of the contract: see *Dimech* v. *Corlett.* (3) I am not at all clear, however, that there is such an exception, and I rather think that in that case it was common ground that the damages actually suffered were at least equal to the amount claimed.

Having got so far I ask myself, if I desired to perform the idle

(1) 13 East, 343. (2) L. R. 6 Q. B. at p. 148.
(3) 12 Moo. P. C. 199.

1915

WALL v. REDERI-AKTIE-BOLAGET LUGGUDE.

Bailhache J.

task of inserting a penalty clause into a charterparty, and at the same time desired to express in words the true legal effect of such a clause instead of leaving the legal effect to be supplied by the parties themselves from their no doubt intimate knowledge of the statute of William, and if at the same time I desired to conciliate the conservatism with which commercial men always regard their familiar documents, how could that be done? Well, I must obviously take the common form and work upon that; I must add something, but as little as possible, to it; and the common form then very naturally takes the shape "Penalty for non-performance of this agreement proved damages not exceeding the estimated amount of freight"; and that is clause 15 of this charterparty. Clause 15, therefore, is nothing more than the common form writ large. This seems to me to solve the question I have to decide, and to solve it in favour of the plaintiffs. Clause 15 is a penal clause and not a limitation of liability clause, and the plaintiffs are right in disregarding it.

There are additional reasons why the estimated amount of the freight in clause 15 should be regarded as a penalty. One excellent reason is that it is so called, a reason which I am aware is not conclusive, but is certainly weighty. Another reason is the entire dissimilarity between clause 15 and the ordinary limitation of liability clause. Upon this I should like to observe that I should require the strongest arguments to induce me to hold that a clause so like the common and undoubted penalty clause has been transformed by the addition of a few words into a limitation of liability clause, to which in form it bears no resemblance. It would be unfair to the charterers in this or any similar case to do so unless the few additional words were of compelling force. Business men are familiar with the usual charterparty clauses. They do not read apparently common form clauses carefully. They know the penalty clause is of no effect, and when they see a clause beginning "Penalty for non-performance" they assume it is their familiar negligible penalty clause, and they pass on. It would never strike them that a clause beginning in that way was a limitation of liability clause, the very appearance of which is usually totally different, and is one to which they know they must pay attention or put up with

the consequences. I am not at all sure that a shipowner who desires to limit his liability must not bring that desire home to the charterers in some clearer way than by a slight change in the phraseology of a clause which is so well known as the common penalty clause is. Again clause 15, though not the commonest form, is by no means unusual, and counsel did not refer me to any case, nor was I from my own limited experience able to remember any case, in which the clause in this form had been relied upon for any such purpose as is put forward in this case. I decide this case, however, upon the ground stated in the earlier part of this judgment, and not upon the additional reasons which I have indicated.

The charterers took a further point based upon the decision in *Jureidini* v. *National British and Irish Millers Insurance Co.* (1), where the House of Lords held that the defendants having repudiated their contract could not rely upon a submission to arbitration contained in the contract. It is not necessary for me to decide the point, but I do not think that case can be treated as going the length of saying that a shipowner, who erroneously supposes a charterparty to be not binding upon him, and who therefore refuses to perform it, could not rely upon a limitation of liability clause in the charterparty. My judgment is for the plaintiffs for 3000*l.* to include the money in Court.

Judgment for plaintiffs.

Solicitors for plaintiffs : *Parker, Garrett & Co.*
Solicitors for defendants : *Botterell & Roche.*

(1) [1915] A. C. 499.

J. F. C.

C. A.
1915
June 2.

[IN THE COURT OF APPEAL.]

MILLER *v.* RICHARDSON.

Employer and Workman—Compensation—Notice of Accident—Default in giving Notice—Employer prejudiced in his Defence—Evidence—Finding in the Proceedings—Burden of Proof—Workmen's Compensation Act, 1906 (6 *Edw.* 7, *c.* 58), *s.* 2, *sub-s.* 1 (*a*).

The applicant on June 26, 1914, met with an accident in the course of his employment, which resulted in his losing the sight of one eye. No notice of the accident was given to the employer until July 6. In proceedings for compensation the county court judge found that there was no evidence before him on which he could find that the employer was not prejudiced in his defence by the want of notice, and dismissed the application :—

Held, on appeal, that the proviso in the Workmen's Compensation Act, 1906, s. 2, sub-s. 1 (*a*), that the want of notice shall not be a bar to proceedings in the cases there mentioned only applies when there is an express finding in the proceedings "that the employer is not . . . . prejudiced in his defence by the want," and that in the absence of such finding the appeal must be dismissed.

Hayward v. *Westleigh Colliery Co.* [1915] A. C. 540 explained and distinguished.

This was an appeal from an award of the judge of the Colne and Nelson County Court, sitting as arbitrator under the Workmen's Compensation Act, 1906.

On Friday, June 26, 1914, Miller, who was in the employ of Richardson, while working at loading stones into a cart, was accidentally struck in the left eye by a piece of stone, with the ultimate result that he became blind of that eye. The blow caused pain and bleeding. The applicant tied his horse to the tail of another cart and rode back in that other cart. After he had got home he went out and saw his own doctor. He went to work on Saturday, but that was the last day he worked. The following week was a holiday, and he saw his doctor every day. He gave no notice to his employer of the accident until July 6, when he sent his wife to tell his employer about the accident, but while she was away the employer came to the workman's house and he told him about it. On August 5 the workman's doctor gave him a certificate in writing that he was suffering from

injury to his eye, which occurred on June 26, 1914, and was unable to follow his employment. The workman gave the certificate to his employer the next day, and on September 5 an officer of an amalgamated society gave formal notice of the accident to the employer on the workman's behalf. The workman claimed compensation. The only defence was that proper notice of the accident had not been given under s. 2 of the Act. (1)

The judge, after finding the facts as above, read a passage from the judgment of the Master of the Rolls in *Webster* v. *Cohen Brothers* (2), that if no notice is given as soon as practicable after the happening of the accident it rests on the workman to satisfy the Court that the employer has not been prejudiced by the absence of such notice, and said: "With regard to that question I cannot find any evidence which was directly addressed to that issue, nor any evidence on other matters from which I can find that the workman has proved that the employer was not prejudiced. One must bear in mind that it is not necessary for the employer to tell the Court what inquiries he might have made and what he might have discovered if he had made them. It is for the workman to prove to the Court (putting it very concisely) that no inquiries of any sort would have done the employer any good. In this case I am not satisfied about that either way. I will merely say that inquiries might have been beneficial to the employer, and, therefore, that he may have been prejudiced. The application must therefore be dismissed with costs."

The applicant appealed.

J. A. Slater, for the appellant. The county court judge was wrong in law in holding that the workman was bound to prove that the employer was not prejudiced. If there was anything before the county court judge to show that the employer was not

(1) Sect. 2, sub-s. 1, of the Workmen's Compensation Act, 1906, contains the following proviso: "Provided always that (*a*) the want of . . . . such notice shall not be a bar to the maintenance of such proceedings if it is found in the proceedings for settling the claim that the employer is not . . . . prejudiced in his defence by the want."

(2) (1913) 6 B. W. C. C. 92.

C. A. 1915

MILLER v. RICHARDSON.

prejudiced, and it is submitted there was, the burden of proof is shifted: *Hayward* v. *Westleigh Colliery Co.* (1)

Atkinson, K.C., and *Harold Morris*, for the respondent, were not called upon.

LORD COZENS-HARDY M.R. This is an appeal from an award made by his Honour Judge Graham in the case of an accident to a man named Miller.

The accident took place on June 26 last year. No written notice was given at any period which is at all material to be mentioned; I pass by what took place in September. No notice of any kind was given to the employer or to his representative until either July 6 or 7, that is to say ten days after the accident. In those circumstances the learned county court judge has dealt with the case under s. 2, sub-s. 1 (*a*) and (*b*), of the Act. He said that no written notice having been given, the applicant cannot claim the benefit of the second limb of that proviso, because he does not even allege that there was any reasonable cause for the failure to give notice. With regard to the first limb it has been argued that the proviso applies because the employer was not prejudiced in his defence by the want of notice.

It is important to see what the proviso says. Sect. 2, sub-s. 1 (*a*), is: "the want of . . . . such notice shall not be a bar to the maintenance of such proceedings if it is found in the proceedings for settling the claim that the employer is not . . . . prejudiced in his defence by the want." There is no finding to that effect here. The learned county court judge has deliberately abstained from finding that. He says: "I cannot find any evidence directly addressed to that issue nor any evidence on other matters from which I can find that the workman has proved that the employer was not prejudiced." On that ground it seems to me that the judgment must stand.

But our attention has been called, and very properly called, to the case of *Hayward* v. *Westleigh Colliery Co.* (1) in the House of Lords, a case which I venture to think has been misunderstood. In that case the county court judge had found as a fact that there

(1) [1915] A. C. 540.

was no prejudice at all. It came up to this Court and we held that there was no evidence upon which he could take that view. The House of Lords took a different view on all the facts of the case, and it was put in this way by Lord Loreburn (1): "My Lords, I think the statute really means that looking at all the matters before him the arbitrator must find that the employer was not prejudiced by want of notice." The arbitrator has not found anything of that kind here. Then Lord Parker said (2): "The arbitrator found that there was no such prejudice. In acting as a Court of Appeal from that decision it is absolutely impossible to set it aside unless the circumstances be such that no reasonable man could from the evidence before the arbitrator have come to that conclusion," and then he said he thought that there was evidence in the case which would justify a reasonable man in coming to the conclusion that the learned county court judge came to. Lord Sumner is still more clear. He said (3): "The other question is whether there was evidence sufficient to warrant the finding that the employer was not prejudiced in his defence"; and again on the same page he says: "The question for the Court of Appeal upon that is whether the totality of such facts contains evidence upon which he could without error in law come to his actual finding of fact."

There is nothing of that kind here; nothing similar in any respect to the case with which the House of Lords was dealing.

Lord Parmoor also gave judgment. He said (4): "Now it has been found in this case in the proceedings for settling the claim that the employer has not been prejudiced in his defence by the want or defect or inaccuracy. Therefore, my Lords, I apprehend the only question to be whether in coming to that conclusion there is any error in law on which the learned county court judge can be put right in the Court of Appeal or in this House. In my opinion there is no error in law of that kind. There is evidence upon which it was competent for him to come to the conclusion which he did, and so long as there is competent evidence the weight of that evidence is wholly for him and not for any other Court at all."

(1) [1915] A. C. 544.
(2) [1915] A. C. 546.
(3) [1915] A. C. 547.
(4) [1915] A. C. 549.

C. A. 1915

MILLER v. RICHARDSON.

Lord Cozens-Hardy M.R.

In my opinion there is nothing in *Hayward* v. *Westleigh Colliery Co.* (1) to support the present appeal. The facts differ essentially. In that case there was a finding of the county court judge of no prejudice. Here there is no such finding, and in my opinion the appeal fails and must be dismissed with the usual consequences.

PICKFORD L.J. I agree. Really I think the only material question here is whether the county court judge did arrive at a finding one way or the other. Indeed, the learned counsel for the appellant has admitted that if it be correct to say that the county court judge has found that the employer was prejudiced, or has found that it has not been proved that he was not prejudiced, then the case is hardly arguable. In my opinion he did so find. He says this: "With respect to the former part, namely, that the workman must prove that the employer was not prejudiced, I cannot find any evidence which was directly addressed to that issue." That is correct, because the evidence as he has stated it, and stated it I think correctly, is that the accident happened on June 26; that the applicant knew it was a serious accident; that on July 6 he sent his wife to tell his employer about it, but in the meantime the employer called and was told about it; that on August 5 he sent him a medical certificate saying that he was suffering from an injury to his eye and was unable to follow his employment, and that on September 5 a notice was sent by an officer of an amalgamated society on behalf of the workman that he had been injured on June 26.

Now I think the learned judge is right in saying that that evidence was not directly addressed to that issue, although they were facts that have to be considered according to the decision of the House of Lords in *Hayward* v. *Westleigh Colliery Co.* (1) in coming to a conclusion whether he was or was not prejudiced. Then he goes on to say: "nor any evidence on other matters from which I can find that the workman has proved that the employer was not prejudiced." If he had said "I find," or "I am of opinion that the workman has given no evidence at all which must be considered on the point," I think, probably,

(1) [1915] A. C. 540.

looking to that case in the House of Lords, that would not have been correct, but he does not say that. What he says is: "I do not find any evidence from which I could find that the workman has proved that the employer was not prejudiced"; that is to say, that, "Looking at the facts as they are before me, they do not satisfy me that it has been proved that the employer was not prejudiced." But that is not the whole of his judgment, because a little later on he says: "One must bear in mind that it is not necessary for the employer to tell the Court what inquiries he might have made and what he might have discovered if he had made them. It is for the workman to prove to the Court (putting it very concisely) that no inquiries of any sort would have done the employer any good. In this case I am not satisfied about that either way. I will merely say that inquiries might have been beneficial to the employer, and, therefore, he may have been prejudiced." That is to say, he says: "I am not satisfied that in fact inquiries would have done the employer any good, but I am also not satisfied that no possibility of their doing him any good has been shown by the evidence," and that is to the same effect as it seems as his previous decision.

That to my mind is the finding, and we cannot interfere with it unless it is wrong in law; unless we can say that upon the facts before the county court judge he was bound in law to find that the employer was not prejudiced, and I do not think it is possible to say that.

In the case of *Hayward* v. *Westleigh Colliery Co.* (1), in which it was held that there was evidence upon which the arbitrator could find that the employer was not prejudiced, it was pointed out that it was a case very near the line indeed. Now this case is not quite so strong, because all those matters, upon which it was said in *Hayward* v. *Westleigh Colliery Co.* (1) evidence might have been adduced, do not exist in this case, and, therefore, that case being very near the line, and this case not being exactly the same in circumstances, I think it is impossible for us to say that that case obliges us to hold that what the learned county court judge did here was something which he could not do in law. If

(1) [1915] A. C. 540.

C. A. 1915

MILLER v. RICHARDSON.

he could do it in law then it is for him to judge whether he could do it in fact.

On those grounds I think that the appeal should be dismissed.

WARRINGTON L.J. I agree. The Act provides that the want of notice shall not be a bar to the maintenance of proceedings if it is found in the proceedings for settling the claim that the employer is not prejudiced in his defence by the want of such notice. In the present case the county court judge in my view has in terms declined to find that the employer was not prejudiced. It was not necessary for him to find that the employer was prejudiced. It was enough for the present purpose that he should decline to find that the employer was not prejudiced, and that in my view he has in terms done. Now, if that is so, how can the applicant succeed in the Court of Appeal? In my judgment he can succeed only if he can show that upon the facts proved in evidence before the county court judge he was guilty of an error in law in refusing to come to the conclusion that the employer was not prejudiced.

In my judgment it is quite hopeless for the applicant to attempt to show that the county court judge committed an error of law in declining to find the fact necessary to excuse the want of notice.

I agree that the appeal ought to be dismissed.

Appeal dismissed.

Solicitors: *Kingsley Wood & Co.; William Hurd & Son, for James Chapman & Co., Manchester.*

J. R. B.

[IN THE COURT OF APPEAL.]

C. A.
1915
June 2, 3.

LUCKIE *v.* MERRY.

Employer and Workman—Compensation—Reasonable Cause for not making Claim within Six Months—Payment by Employer of Full Wages—Workmen's Compensation Act, 1906 (6 *Edw.* 7, *c.* 58), *s.* 2.

A workman while in the employment of an employer as horsekeeper and van driver met with an accident in the course of and arising out of his employment by which his hand was severely crushed. Notice of the accident was given at once. The next day the employer sent for the workman and, after asking him about the accident, said, "You can potter about the factory until you are better." The workman continued to attend at the factory and did what work he could, receiving full wages all the time. At first the work he could do was little, but for about a month before his dismissal he was doing the work he had done before the accident, except part of the grooming of the horses. A little more than seven months after the accident he was dismissed for misconduct quite unconnected with the accident. He then claimed compensation. The only defence was that no claim had been made within six months of the accident:—

Held, that under the special circumstances of the case the failure to make a claim within six months was occasioned by reasonable cause within the meaning of s. 2 of the Workmen's Compensation Act, 1906.

Healey v. *Galloway* (1907) 41 Ir. L. T. R. 5 and *Lynch* v. *Marquis of Lansdowne* (1913) 48 Ir. L. T. R. 89 discussed and distinguished.

The applicant in this case had been in the service of the respondent for seventeen years as a horsekeeper and driver of a van delivering goods to customers. The respondent was a mineral water manufacturer. On October 31, 1913, while going round with the van the applicant crushed his hand badly by letting a four-and-a-half gallon barrel of ginger beer fall upon it. He managed to drive the van back with one hand and told the foreman, Jones, about the accident. Jones put up his horse for him and the applicant went home. The next morning his employer sent for him and asked what he had done. He then told him all about the accident. The employer said, "You can potter about the factory until you are better." The applicant gave evidence that on the following day he told the foreman that his doctor had told him he ought to make a claim for compensation. The foreman said, "You will get your wages," and he was

C. A. 1915

LUCKIE v. MERRY.

paid full wages until his dismissal. He did not make any further claim. He attended at the factory and did what work he could, and for a month before his dismissal was doing his old work, except that he could not do all the grooming of the horses. On June 13, 1914, he was dismissed, with a week's wages in lieu of notice, for misconduct, which had no connection with the accident. The applicant then commenced proceedings for compensation under the Act. It was admitted that his hand was still stiff and he would have been entitled to some compensation if he had made a claim in time. The defence was that no claim for compensation had been made within six months of the accident. The applicant said he had told the foreman that he had a claim, but the judge held on the evidence that in fact no claim was made within six months.

Sect. 2 of the Workmen's Compensation Act, 1906, provides that: "(1.) Proceedings for the recovery under this Act of compensation for an injury shall not be maintainable unless notice of the accident has been given as soon as practicable after the happening thereof . . . . and unless the claim for compensation with respect to such accident has been made within six months from the occurrence of the accident causing the injury: Provided always that . . . . (*b*) the failure to make a claim within the period above specified shall not be a bar to the maintenance of such proceedings if it is found that the failure was occasioned by mistake, absence from the United Kingdom, or other reasonable cause."

The county court judge, after stating the facts of the case as above, said that if the question which he had to decide were one of fact, and reasonable cause meant a cause which made it reasonable for the workman not to make a claim, he should decide the question in favour of the workman; but Farwell L.J. had stated in *Moore* v. *Naval Colliery Co.* (1) that what is reasonable cause is a question of law; and he felt himself bound to follow the decisions of the Irish Court of Appeal in *Healey* v. *Galloway* (2) and *Lynch* v. *Marquis of Lansdowne* (3), which decided that the mere payment of wages by the employer was not a "reasonable cause" for the workman's not making

(1) [1912] 1 K. B. 28, 34. (2) 41 Ir. L. T. R. 5.
(3) 48 Ir. L. T. R. 89.

a claim within six months. He therefore made his award in favour of the employer.

The workman appealed.

C. A. 1915

LUCKIE v. MERRY.

Charles Doughty, for the appellant. The county court judge relied upon two cases decided in Ireland, *Healey* v. *Galloway* (1) and *Lynch* v. *Marquis of Lansdowne* (2), but the first of these cases was founded on *Wright* v. *John Bagnall & Sons* (3), and was decided under the Act of 1897. In that Act there was no mention of "other reasonable cause," and the absence of claim was a complete bar to relief unless the applicant could prove conduct on the part of the employer which made it inequitable for him to rely on the absence of claim. The second case treats the first as an authority that payment of wages by the employer could not be any evidence of "other reasonable cause." That is clearly wrong. *Rendall* v. *Hill's Dry Docks and Engineering Co.* (4) was decided when it was supposed that a claim meant a request for arbitration proceedings. *Turnbull* v. *Vickers* (5) is in my favour. The judgment of the Court of Appeal in *Coulson* v. *South Moor Colliery Co.* (6) shows that the judge may look at all the surrounding circumstances to ascertain what is a reasonable ground for not making a claim. Farwell L.J. in *Moore* v. *Naval Colliery Co.* (7) said that the question of what is reasonable cause was a question of law. But the question is what is reasonable under the surrounding circumstances which are facts to be found by the county court judge. In *Powell* v. *Main Colliery Co.* (8) Lord Halsbury pointed out that no technical words are used in this section, and the arbitrator is entitled to use his own judgment and knowledge.

It has been settled that the claim need not be for a specific amount: *Thompson* v. *Goold & Co.* (9); and need not be in writing: *Lowe* v. *M. Myers & Sons.* (10)

W. O. Hodges (*W. Addington Willis* with him), for the

(1) 41 Ir. L. T. R. 5.
(2) 48 Ir. L. T. R. 89.
(3) [1900] 2 Q. B. 240.
(4) [1900] 2 Q. B. 245.
(5) (1914) 7 B. W. C. C. 396.
(6) [1915] W. N. 83; 8 B. W. C. C. 253.
(7) [1912] 1 K. B. 28, 34.
(8) [1900] A. C. 366, 371.
(9) [1910] A. C. 409.
(10) [1906] 2 K. B. 265, 273.

C. A. 1915

LUCKIE v. MERRY.

respondent. The first question is what has the county court judge found. He has found there was no claim. The applicant tries to make out that the reference to the man's having been injured, &c., amounts to a claim, but that is inconsistent with the finding of the judge.

The question whether there is reasonable cause for not making a claim must be a question of fact or of law. Farwell L.J. in *Moore* v. *Naval Colliery Co.* (1) said it is a question of law. The county court judge as a jury finds the facts and then decides as a point of law whether there is reasonable cause, and on that point there can be an appeal. It is submitted that that is correct and quite consistent with *Coulson* v. *South Moor Colliery Co.* (2)

A man is under no obligation to claim under the Act, but if he does claim he must make his claim within six months or prove reasonable cause for not doing so; the onus is on him. In this case the workman has given no evidence of any reasonable cause for not making a claim or of any fact from which any reasonable cause could be inferred. The equitable doctrine of waiver or estoppel might come in if the employer had paid full wages until the time for making a claim had elapsed and then turned out the workman, but that is not the present case. The man was dismissed for misconduct. *Healey* v. *Galloway* (3) turned chiefly on the conduct of the master, but it decided that the fact that he had paid wages did not estop him from raising the defence that the claim was not made in time. *Lynch* v. *Marquis of Lansdowne* (4) decides clearly that payment of wages is a neutral fact from which no inference can be drawn. *Lowe* v. *M. Myers & Sons* (5) turned upon an admission in the answer. *Turnbull* v. *Vickers* (6) has nothing to do with this case. A workman's ignorance of his rights is not a reasonable cause: *Roles* v. *Pascall & Sons.* (7)

LORD COZENS-HARDY M.R. This is an appeal from a decision of his Honour Judge Parry, and it raises undoubtedly an impor

(1) [1912] 1 K. B. 28, 34.
(2) [1915] W. N. 83; 8 B. W. C. C. 253.
(3) 41 Ir. L. T. R. 5.
(4) 48 Ir. L. T. R. 89.
(5) [1906] 2 K. B. 265.
(6) 7 B. W. C. C. 396.
(7) [1911] 1 K. B. 982.

C. A. 1915

LUCKIE v. MERRY.

Lord Cozens-Hardy M.R.

tant point under the Workmen's Compensation Act, 1906. [His Lordship stated the facts of the case as above and continued :]

When the workman was discharged he made an application for compensation, and the only point raised against him was that he had not made a claim within six months from the date of the accident. The failure to make the claim is not a bar to the maintenance of proceedings if it is found that the failure was occasioned by reasonable cause. When the case came before the county court judge, he, having found the material facts as above, said that his own opinion was that there was reasonable cause for not making the claim before. But he referred to two Irish cases, *Healey* v. *Galloway* (1) and *Lynch* v. *Marquis of Lansdowne* (2), and said : "If, as I have no reason to doubt, those cases have limited the meaning of s. 2 (1.) (*b*) of the Workmen's Compensation Act, 1906, my task is made easier. As an arbitrator I cannot find the fact of reasonableness, for that is a question of law. The legal question on similar facts to these has been decided in the Irish Court of Appeal, whose decisions on matters connected with the Workmen's Compensation Act always seemed to me of equal insight and learning with our own. Following these authorities, therefore, I award for the respondent with costs." This raises an important point. It is this: an old servant meets with an accident in the course of his employment to the knowledge of his master, who treats him well and tells him, "Notwithstanding you are not able to do your ordinary work, go and potter about in the works." He remains there, and after a time he does his old work again fully, except that there is some portion of the grooming which he is not able to manage, but, speaking substantially, during more than six months he remains in the employment of his master, receiving his old wages, and for part of the time doing his old work. Is that a reasonable cause for not making a claim, which need not be a written claim? "Reasonable cause" of course must have reference to the workman himself. I find a difficulty in appreciating how there can be any great importance from the employer's point of view in the claim being given within six months. The importance of notice of the accident is clear beyond question,

(1) 41 Ir. L. T. R. 5. (2) 48 Ir. L. T. R. 89.

C. A. 1915

LUCKIE v. MERRY.

Lord Cozens-Hardy M. R.

and the language of s. 2, sub-s. 1 (*a*), explains that, because there are much wider words used with reference to the notice of the accident than there are with regard to the claim under sub-s. 1 (*b*). In my opinion, if I am not bound by authority, I should say without hesitation, looking, as I am entitled to do, to the facts that this was an old servant, and his master when the accident was explained to him gave the direction above quoted, that there was reasonable cause from the man's point of view for not giving a notice such as this: "I have no claim now because you are paying me my full wages, but mind you there may be in the future a contingent claim which I shall have against you for compensation." That would be a sufficient notice. It would be narrowing the construction of the words "reasonable cause" if we were to say that in this case, having regard to all the circumstances, there was not a reasonable cause.

But the learned judge felt himself bound by the Irish cases. Of course one always speaks with the greatest possible respect of decisions of a co-ordinate Court in Ireland, but I think when those two cases are looked at it will be found that they scarcely warrant—certainly one of them does not—the use which is made of them by the learned county court judge. The first case was *Healey* v. *Galloway*.(1) It was decided under the old Act, in which there was nothing to bring in the question of reasonable cause as a justification for not having made a claim within six months. The decision of the Court there was that the mere fact that the employer had paid wages after the accident was not such a circumstance as amounted to a waiver on his part of notice of claim, or, to put it another way, as laid a foundation for an estoppel to prevent the master from asserting the truth, namely, that no claim had been made. That is the sole point of that case. Nothing was decided about reasonable cause, because in the old Act there was no mention of reasonable cause.

Then we come to *Lynch* v. *Marquis of Lansdowne* (2), which is a case under the present Act, and in that case, with the greatest possible respect, the Court of Appeal seem to me to have misunderstood *Healey* v. *Galloway* (1), and treated it as really deciding a point which was not raised and could not have

(1) 41 Ir. L. T. R. 5. (2) 48 Ir. L. T. R. 89.

C. A. 1915

LUCKIE v. MERRY.

Lord Cozens-Hardy M.R.

been raised in it. In *Lynch* v. *Marquis of Lansdowne* (1) there was no claim within six months. The marginal note is: "Mere payment of wages, or part wages, by an employer to an injured workman after the latter has been injured is, by itself, a neutral fact, and is not sufficient to enable the Court to draw the inference that the workman had 'reasonable cause' within the meaning of the statute for not making a claim within six months of the date of the accident."

The Irish Lord Chancellor, Lord O'Brien, says this: "I think that the case of *Healey* v. *Galloway* (2) settles the law as regards this case." With the greatest possible respect, *Healey* v. *Galloway* (2) had no more to do with that case than any other case in the books. He says again: "That case shows that the mere fact of the employer having paid whole wages or half wages is not in itself such a fact that the county court judge can draw the inference that the workman had reasonable cause for not making the claim." That again is a misconception of what *Healey* v. *Galloway* (2) decided or could decide. Holmes L.J. takes the same view that the payment of wages is a neutral fact which taken by itself could not be reasonable cause, and says: "That is precisely the decision which this Court came to in *Healey* v. *Galloway* (2), and I think it is always desirable in these cases for the Court to follow carefully its own decisions."

I wish not to be misunderstood on this point. I am very far from saying that in all circumstances payment of wages will be a reasonable cause, but I think we are entitled, if not bound, to look at the circumstances of the relation between this man and his master. I attach great importance to the fact that he was an old servant whose master was treating him well and continued to treat him well until he was discharged for other reasons. I should be extremely sorry to think that a man under those circumstances was to lose all right to compensation unless he verbally, for that would be quite sufficient, says to his master who is so treating him, "Mind, I may have a contingent claim against you at some future time." The payment goes on, and I think it would be a foolish and unreasonable thing for a man to have given such a contingent notice of claim to his master. I

(1) 48 Ir. L. T. R. 89. (2) 41 Ir. L. T. R. 5.

C. A. 1915

LUCKIE v. MERRY.

think there was reasonable cause for not making the claim within six months, and that being so, the learned county court judge was at liberty in point of law to follow his own view of the case. The appeal must be allowed and the case must go back to the county court judge to assess the compensation.

PICKFORD L.J. I am of the same opinion. The workman undoubtedly suffered an accident which would have given him a right to compensation under the Workmen's Compensation Act if he had not in some way lost that right. What took place after the accident is stated by himself in his evidence. [His Lordship read the plaintiff's evidence as to the conversations between himself and the foreman and the master which the judge had accepted, and continued.] That conversation with the foreman was relied upon as being a claim, but the learned judge has held that it was not a claim. On those facts the learned judge expressed his own opinion strongly that there was reasonable cause for not making the claim, but he said that he felt himself bound to decide to the contrary because of the Irish cases. Probably he was right in treating the cases with the respect with which every judge treats, or ought to treat, the decision of another Court, whether he agrees with it or not. But it is necessary for us in this Court, I think, to examine those cases and to see whether the learned county court judge was right in following them. The objection taken to the workman's claim was that he had not made a claim within six months from the occurrence of the accident as required by s. 2, sub-s. 1, of the Act. [His Lordship read that section and continued.] It has been decided by the House of Lords, and is now beyond question, that the claim for compensation does not mean any filing of a formal claim or request for an arbitration or any commencement of proceedings, but that the section may be satisfied by any intimation that a claim is going to be made. [His Lordship read clauses (*a*) and (*b*) of s. 2, sub-s. 1, and proceeded.] There is here no special limitation apart from the ordinary law of the time within which the proceedings strictly so called—the filing of a request for arbitration—may take place. It is perfectly clear, therefore, that the making of the claim within the six

months is really a pure technicality and formality and would affect nobody. That seems to me to be important in this way. When you have to consider whether there is reasonable cause for not doing an act, the circumstances which will constitute reasonable cause for not doing an act which is a mere idle formality may be less in degree than those which will constitute reasonable cause for not doing something which is of real importance. A conversation about compensation—that is to say about the advice to make a claim for compensation—took place with the foreman; the accident was certainly discussed with the foreman, and with the master, and I think they may be taken, if not to have known their rights, as the learned county court judge says, under the Workmen's Compensation Act, at least to have known that there was a Workmen's Compensation Act under which a claim might be made, and the fact that in those circumstances, after discussing the accident and its nature and circumstances, payment of wages is made, does I think constitute reasonable cause for not making a claim. It has been said by the learned county court judge, and it is in agreement at any rate with the dictum of Farwell L.J. in one of the cases, that the question of reasonable cause is a question of law, and not a question of fact. If it has been decided to be a question of law, of course that is an end of the matter. I am not quite clear whether it has been definitely so decided. I do not think it is necessary to decide the point in this case. I only wish to say, if it be still open for discussion, I should like to reserve any opinion as to whether reasonable cause is a matter of law or a matter of fact.

That is the decision at which I should have arrived, and at which the learned county court judge would have arrived apart from the cases in Ireland which he thought obliged him to decide otherwise. I confess that they do not seem to me to be very satisfactory, or to compel us to decide in accordance with the second of them, which is *Lynch* v. *Marquis of Lansdowne*. (1) The other case is not in my opinion an authority with regard to this matter at all. The case of *Lynch* v. *Marquis of Lansdowne* (1) is an authority which we are of course not bound to follow, but we should treat it with the greatest respect if it represented

(1) 48 Ir. L. T. R. 89.

C. A. 1915

LUCKIE v. MERRY.

Pickford L.J.

the considered opinion of the learned judges in that case on the point. It does not seem to me to represent that. It simply follows the other case of *Healey* v. *Galloway*. (1) [His Lordship read the same passages from the judgments of the Lord Chancellor of Ireland and Holmes L.J. as were read by the Master of the Rolls, and continued.] The only independent decision of the Court in that case is that the mere payment of wages without anything else is not enough material from which to draw the inference that there was reasonable cause for not giving the notice. In this case, as I pointed out, there is more than the mere payment of wages. There is the payment of wages coupled with the facts which I have already mentioned. The rest of the case is a mere acceptance of the case of *Healey* v. *Galloway* (1) as being an authority which concludes the Court, and obliges them, as Holmes L.J. says, to follow carefully the previous decisions of the Court.

Now when you come to look at *Healey* v. *Galloway* (1) it does not decide, with the greatest respect to those learned judges, anything of the sort. It was under the old Workmen's Compensation Act, under which there was no provision whatever to excuse the workman from making his claim within a certain time if there were reasonable cause, and the only way in which he could get rid of the bar created by his not having made his claim was to show that the employer's conduct had been such that he was estopped—to use an expression which is sometimes used in the cases—or that it was inequitable for him—to use another expression sometimes used—to set up that defence. That, I think, seems to be quite clearly shown by an interlocutory remark of Fitzgibbon L.J. during the argument. He says this, after the cases of *Wright* v. *John Bagnall & Sons* (2) and *Rendall* v. *Hill's Dry Docks and Engineering Co.* (3) had been cited to him, cases which turned on estoppel and estoppel purely: "To render it inequitable on the part of the employer to rely on that defence the payments must have been made in such a manner as to mislead the workman"—that is to say, in order to give rise to an estoppel of this kind it must be shown that the

(1) 41 Ir. L. T. R. 5. (2) [1900] 2 Q. B. 240.
(3) [1900] 2 Q. B. 245.

workman had been led by the conduct of the employer to alter his position. Then the judgment was given by the Lord Chancellor, and it was this: "I can find no grounds upon which the applicant can escape from the effect of the statutory requirement as to notice." Then he deals with something that is negatived by the finding of the recorder. "It is perfectly plain that if this case were to be sent back to the recorder he would find against the applicant on the question of waiver, or would be wrong if he did not do so, as there is no evidence in the case stated which would enable him to decide otherwise. There are clear findings against the applicant in every other branch of the case."

It is quite clear on reading that case that it did not decide the question of reasonable cause at all. It could not, because it was not before the Court. What was decided was that the circumstances in that case were not such as to raise an estoppel against the master. It has been argued before us that that does not make any difference and that the facts necessary to constitute reasonable cause must be such as also to constitute an estoppel against the master. I cannot accept that argument at all. The question of estoppel deals with the conduct of the master. The Act of 1906 contains an excuse for the non-making of the claim by the workman similar to that which the old Act, and the new Act too, contain as to excusing him for not giving notice, namely, if it has not been done for, amongst other things, reasonable cause. Now, that does not deal with the conduct of the master at all. That deals simply with the conduct of the workman, although no doubt the conduct of the master may be an element to be considered in seeing whether the conduct of the workman is reasonable. I cannot think that the principles which we have to apply in order to see whether there is estoppel or not by reason of the conduct of the master can be exactly the same as those we have to apply in order to see if there is reasonable conduct and reasonable cause upon the part of the workman. It seems to me the proposition only wants stating to show that it is not correct, and I cannot have any doubt that this provision was introduced in the later Act for the purpose of relieving the position of the workman. In

C. A. 1915

LUCKIE v. MERRY.

Pickford L.J.

my opinion it has altered the matters we have to consider, and therefore I think that the learned judges of the Court of Appeal in Ireland were, speaking with the greatest respect, in error when they said that the case of *Healey* v. *Galloway* (1) in any way governed the case of *Lynch* v. *Marquis of Lansdowne*. (2) I do not think it necessary to discuss or question their statement that the mere payment of wages is a neutral fact which does not prove anything either one way or the other. That may or may not be correct. I do not think it necessary to examine into it. It must be very rarely indeed that you have the mere payment of wages without anything else. Here you have not the mere payment of wages without anything else. You have a payment of wages after the accident and its circumstances and its nature have been fully explained to the employer and to his foreman, and, although I do not ground my judgment upon it at all, possibly after the foreman had been informed that the workman had been advised to make a claim. Therefore I do not think that these Irish cases in any way obliged the learned county court judge to decide as he did, and contrary to his own opinion. I think that his own opinion was right, and I think that the case must go back to him to assess compensation.

WARRINGTON L.J. I am of the same opinion. The accident in this case happened on October 31, 1913. The workman did not make the claim for compensation in respect to the accident within six months from that date, but he says that his failure to make the claim within that period was occasioned by reasonable cause, and therefore is not a bar to the maintenance of the proceedings for arbitration. The only question we have to decide is whether under the circumstances of this particular case the failure of the workman to make the claim was occasioned by reasonable cause. In the first place it is now settled that the making of the claim is not the same thing as the institution of proceedings: the expression "making the claim" is satisfied by any form of statement by the workman to the employer that he has a claim under the Workmen's Compensation Act. It is a pure formality. It has no effect whatever upon the conduct of

(1) 41 Ir. L. T. R. 5. (2) 48 Ir. L. T. R. 89.

the master, in that respect differing from the giving of notice of the accident. The circumstances of this case from which we are asked to decide that the workman had reasonable cause for his failure to go through the formality to which I have referred are these. [His Lordship stated the facts as above.] I should infer that the failure to make the claim, that is to say the failure to follow the doctor's advice, was occasioned by the second conversation with the foreman when he told the man that he would receive his wages. So far then the failure was occasioned by that cause. It remains then to consider whether the cause was a reasonable cause or not. The county court judge would, if he had been at liberty so to do, have found that the cause was a reasonable cause. I agree with him. I think, under the circumstances of this case, the long period of service, the relations between the employer and the servant, the way in which the employer himself treated the matter as soon as he heard of the accident, the promise by the foreman, amply fulfilled, that he should receive his wages, all to my mind make it eminently reasonable that the workman should abstain from making the formal claim required by the Act. I think the county court judge was right in saying that exercising mere common sense one would say that was a reasonable cause.

But then it is said we are precluded from coming to that conclusion by the two Irish cases of *Healey* v. *Galloway* (1) and *Lynch* v. *Marquis of Lansdowne*. (2) The county court judge has thought himself so bound. But when those cases come to be examined, in my opinion they do not bind this Court or any Court to come to the conclusion that under circumstances such as I have mentioned the failure was not occasioned by a reasonable cause. I do not think it necessary to go through those cases in detail after what my learned brethren have said about them. I will only say this. *Healey* v. *Galloway* (1) was decided in the year 1906, and was a decision under the Act of 1897 and not under the Act of 1906. The Act of 1897 did not contain the provision contained in the Act of 1906 whereby the failure to make the claim may be excused if it is found to have been occasioned by reasonable cause, and the only way in which the

(1) 41 Ir. L. T. R. 5. (2) 48 Ir. L. T. R. 89.

C A. 1915

LUCKIE v. MERRY.

Warrington L.J.

workman could under that Act escape from the consequences of not having made the claim was to establish that the master was estopped from relying on that particular defence, and what *Healey* v. *Galloway* (1) decided was that the facts of that case, including as they did the payment of wages by the master, were not sufficient to estop the master from setting up that defence. That is all that the case decided, and that is all that it could have decided.

The second case of *Lynch* v. *Marquis of Lansdowne* (2) was decided in the year 1913, and it was a decision under the Act of 1906, but the vice of the decision, if I may say so with all respect, is that the three learned judges who were sitting then in the Court of Appeal in Ireland thought themselves bound by the decision in *Healey* v. *Galloway* (1) to come to the conclusion that the payment of wages by the master was not a reasonable cause. The decision in *Healey* v. *Galloway* (1) was that the payment of wages by the master was not such conduct on his part as would estop him from setting up the defence, and I think, speaking with the greatest respect, that those three learned judges did not sufficiently consider the difference between the question they had to decide, namely, whether the workman had reasonable cause for his conduct, and the question which in *Healey* v. *Galloway* (1) they had to decide, namely, whether the conduct of the master was such as to affect his position and prevent him from setting up a particular defence. I think it is quite plain when you come to look at the judgments in *Lynch* v. *Marquis of Lansdowne* (2) that they considered themselves bound by the decision in *Healey* v. *Galloway* (1) to come to the conclusion which they came to, and when that decision is carefully examined and the different circumstances of the two cases are considered, I think it is quite clear that they were not so bound.

In my opinion the matter must go back to the county court judge to assess compensation.

Appeal allowed.

Solicitors: *Kingsley Wood & Co.; Williams & Powell.*

(1) 41 Ir. L. T. R. 5. (2) 48 Ir. L. T. R. 89.

J. R. B.

[IN THE COURT OF APPEAL.]

C. A.

1915

June 8.

GREENWOOD *v.* NALL & CO., LIMITED.

Employer and Workman — Compensation — Basis of Calculation—Death— Employment by same Employer for Three Years—Interruptions—Average Weekly Earnings—Workmen's Compensation Act, 1906 (6 *Edw.* 7, *c.* 58), *Sched. I., paragraphs* 1 (*a*) (i.), 2 (*c*).

In a claim for compensation under the Workmen's Compensation Act, 1906, by the dependant of a deceased workman it appeared that the deceased had been in the service of the same employers for the three years next preceding the accident, but had during that time been absent from work through illness on many occasions amounting altogether to about six months. His actual earnings during the three years amounted to 168*l.* 13*s.* 5*d.* :—

Held, that the case came within Sched. I., paragraph 1 (*a*) (i.), of the Act, that paragraph 2 (*c*) did not apply, and that an award of 168*l.* 13*s.* 5*d.* compensation was right.

Perry v. *Wright* [1908] 1 K. B. 441 followed.

Appeal from an award of the judge of the Salford County Court sitting as arbitrator under the Workmen's Compensation Act, 1906.

On September 7, 1914, William Greenwood, employed as a carter by Joseph Nall & Co., Limited, met with an accident from which his death resulted on September 12. His widow claimed 212*l.* 19*s.* 9*d.* compensation and stated that his average weekly earnings were 1*l.* 7*s.* 3*d.* The employers admitted their liability, but disputed the amount of compensation payable. It was admitted that his actual earnings during the three years next before the accident had amounted to 168*l.* 13*s.* 5*d.*

The deceased had been in the service of the employers for the three years preceding the accident, but had during that time been absent from work through illness on several occasions, the longest absence being six weeks, amounting altogether to about six months.

The learned judge relied on *Perry* v. *Wright* (1) and awarded 168*l.* 13*s.* 5*d.* compensation.

The applicant appealed.

(1) [1908] 1 K. B. 441.

C. A. 1915

GREENWOOD v. NALL & CO., LIMITED.

McCall, K.C., and *T. B. Leigh*, for the appellant. The learned judge has calculated the amount of compensation on a wrong basis. There was not employment for the whole of the three years, but for two and a half years of that time; therefore under Sched. I., paragraph 1 (*a*) (i.), of the Workmen's Compensation Act, 1906, the judge ought not to take the actual but the average earnings. Sched. I., paragraph 1, is subject to the provisions of Sched. I., paragraph 2, as to earnings and average weekly earnings, and by Sched. I., paragraph 2 (*c*), "employment by the same employer" means employment "uninterrupted by absence from work due to illness or any other unavoidable cause." Here there had been interruptions and the arbitrator had to find out what were the average weekly earnings and multiply them by 156. It is common ground that the actual earnings of the deceased during the three years were 168*l.* 13*s.* 5*d.*, and the judge has held that that is the sum to which the applicant is entitled. The appellant contends that the interruptions have constituted breaks of employment, so that the employment does not fall within the first part of paragraph 1 (*a*) (i.), and the average weekly earnings were 1*l.* 7*s.* 3*d.*, so that the applicant is entitled to 212*l.* 19*s.* 9*d.* There has not been three years' employment by the same employer. The construction of paragraphs 1 and 2 has been considered in *Perry* v. *Wright* (1), *Gill* v. *Fortescue & Sons* (2), and *Carter* v. *John Lang & Sons*. (3)

T. Eastham, for the respondents. Sched. I., paragraphs 1 and 2, have been construed by the Court of Appeal in *Perry* v. *Wright* (4), and it is clear from that decision that paragraph 2 (*c*) does not apply to this case at all; it does not apply to paragraph 1 (*a*) (i.). The whole of paragraph 2 (*a*), (*b*), (*c*) and (*d*) is governed by the opening words of paragraph 2: "For the purposes of the provisions of this schedule relating to 'earnings' and 'average weekly earnings' of a workman, the following rules shall be observed." Therefore (*c*) only applies when the amount of the average weekly earnings has to be determined. There was in this case continuous employment for three years, and the judge had only to find what the deceased's

(1) [1908] 1 K. B. 441, 458.
(2) (1913) 6 B. W. C. C. 577.
(3) (1908) 1 B. W. C. C. 379.
(4) [1908] 1 K. B. 441.

actual earnings had been. Absence of this kind through illness does not constitute a break of the employment: *Jones* v. *Ocean Coal Co.* (1)

McCall, K.C., replied.

LORD COZENS-HARDY M.R. This appeal raises a point which was said to be, and I daresay is, one of very general importance. It arises upon the construction of the somewhat difficult first paragraph of the First Schedule of the Act. The man, whose dependants are the applicants, met with his death through an accident. He had been in the employment of the same employers, who are the defendants in this application, during the three years next preceding the injury. Before I deal with those words "during the three years next preceding the injury" I must consider what is to happen in the case of death. Then if the workman leaves any dependants the compensation is to be what?—"a sum equal to his earnings in the employment of the same employer during the three years next preceding the injury, or the sum of one hundred and fifty pounds, whichever of those sums is the larger." That seems to me to make unnecessary the idea of ascertaining the average rate of his earnings. It is a matter of pure arithmetical calculation. If the man has been in the employment of the same master for a period of three years next preceding the injury, you are not to go into a speculation as to the average rate of his weekly earnings during the whole period, but simply, as an addition sum, take the pay sheets, or pay books, or whatever it may be, and add up that total, and that gives you a figure, which figure will not in any way depend upon the fact whether during the same three years the man has been in the same grade throughout, that is to say, in the first year x, in the second year y, and in the third year z. But there may be many cases in which that test will not apply. It may be that the man has not been in the employment of the same employer so long as three years, and then the paragraph provides that "the amount of his earnings during the said three years shall be deemed to be one hundred and fifty-six times his average weekly earnings during the period of his actual

(1) [1899] 2 Q. B. 124.

C. A. 1915

GREENWOOD v. NALL & CO., LIMITED.

Lord Cozens-Hardy M.R.

employment under the said employer," and at the end of sub-paragraph 2 there is a very elaborate code explaining how the average weekly earnings of a man employed by an employer for less than three years is to be ascertained.

Now what is the meaning of the phrase "in the employment of the same employer during the three years next preceding the injury"? When you look at paragraph 2, sub-paragraph (*c*), which plainly is incorporated in the earlier part of the First Schedule, paragraph 1, you find this "employment by the same employer" does not mean that the man may have been employed during that period in the same grade, but in a change of grades. The change of grade for the purpose of this section is the commencement of a new employment. That is one intention of the generality of the language used in the first part. Then there is another. In considering whether the employment is with the same master, you are not to have regard to absence from work during illness or any other unavoidable cause. Sub-paragraph (*c*) seems explicit on that point—"employment by the same employer shall be taken to mean employment by the same employer in the grade in which the workman was employed at the time of the accident, uninterrupted by absence from work due to illness or any other unavoidable cause." For instance, take a week in which there are days on which a man could not possibly work. There are many cases we have had before us in which there were certain rather lengthy periods of what I may call compulsory holidays, or so nearly compulsory that they are usually, and must be, treated as though they were compulsory. You cannot take that, if the contract of employment continued all the three years, as if the man was absent from illness or any other unavoidable cause. Then apply that here. Here the man has been employed in the same grade and by the same employer for three years. He has been absent for not six months at one period, but for various periods by reason of accident or illness, and the longest complete gap, if I may so call it, was a period of six weeks; but taking all the absences through sickness or accident during the three years they amount on the whole to six months. It is said you must in ascertaining the average weekly earnings ascertain the rate at which he was paid, multiply it by

the proper sum, and then take the divisor from the number of days that this man was actually at work; that is to say, you must omit the half-year during which he was absent from work from illness or any other cause. If that is correct the appeal is correct; if it is not correct the appeal fails.

I think, apart from authority, and I prefer for the moment to deal with it apart from authority, upon the true construction of paragraph 1 (*a*) (i.) all we have to do here, and all the learned county court judge had to do, is to do a simple arithmetical sum in addition, namely, from the pay sheets, or whatever it is, ascertain the number of pounds, shillings, and pence which was in fact paid to this man by his employer for the period of three years prior to the accident, and we have nothing whatever to do with his average weekly earnings. But I have very grave doubt whether it is open to us now to come to a different conclusion, if the conclusion I have stated is wrong, because this section was very elaborately discussed by this Court in *Perry* v. *Wright* (1) On p. 453 of [1908] 1 K. B., dealing with sub-paragraph (*c*), which defines "employment by the same employer," I say: "Its language is very obscure, but I understand it to mean this: Any step up or any step down from one grade to another is to be regarded as commencing a fresh employment. But in calculating any of the periods mentioned in paragraph 1 you are to disregard absence due to illness or to causes beyond the control of the workman, and to reckon the employment as continuous notwithstanding any such absence. This will be only a presumption which may be rebutted by evidence that the workman was in fact discharged on the ground of such absence and subsequently re-engaged." Mr. McCall asked what would be the result supposing the man only worked a year and a half out of three years? Then probably I think it would be a presumption that the work was not actually continuous, if it began again after the interval of a year and a half, but no such point arises here. When I come to Fletcher Moulton L.J.'s judgment on p. 460 it seems to me in terms to cover the present case. He says: "But it must be remembered that in the special case to which I have referred"—

(1) [1908] 1 K. B. 441.

C. A. 1915

GREENWOOD v. NALL & CO., LIMITED.

Lord Cozens-Hardy M.R.

that is the case which he has referred to at the top of p. 460—"there is no question of average at all, nor is the Court directed or authorized to ascertain the rate per week at which the workman was being remunerated. None of the language which the Court has to interpret with regard to average weekly earnings applies to the case. The Legislature may well have considered that, in a case where there has been three years' uninterrupted employment by the same employer in the same grade of employment, the most satisfactory solution of the difficult question of quantum of compensation would be to take facts as they stand and let the quantum be the reproduction of the actual earnings of that period." In my opinion, apart from that authority, I think the decision of the learned county court judge was right, and having regard to that authority it is not open to us in this Court to say that his decision is otherwise than right. If a different view is to be taken it must be taken elsewhere.

PICKFORD L.J. I am of the same opinion. I base my judgment entirely upon the point that this case is covered by the authority of *Perry* v. *Wright.* (1) In doing that I do not express any dissent from that case, but if I had to form my own opinion on the extraordinarily obscure terms of this paragraph with its provisoes and sub-headings, I should require a longer time to consider it. It seems to me it is obviously covered by the case of *Perry* v. *Wright.* (1) I do not mean by that that it is covered by the actual decision. What I mean is that it is covered by the interpretation given to this schedule and to its provisions by the Court in that case, which was one of three which this Court decided to hear together and to deliver judgment upon the general construction of the schedule. Under those circumstances I do not think, whether it was technically necessary for the decision of any one of those three cases or not, we ought to depart from the decision expressed in that case.

This man was employed for three years in the same employment. He did not, for reasons arising from illness or absence, work more than 130 weeks in the three years instead of 156;

(1) [1908] 1 K. B. 441.

and the contention on behalf of his dependants was that to arrive at the amount that they were to get it was necessary to take the earnings during that period, divide that total sum by 130, and multiply the sum arrived at by 156. That seems to me to be directly contrary to what is said, not only by the Master of the Rolls in the passage to which he has referred, but to what was said by Fletcher Moulton L.J. He began by saying, "Excepting in one instance, with which I shall deal later on, the first process in the determination of the compensation to be awarded to an applicant is the ascertainment of what is termed his 'average weekly earnings'"; and then when you have got that he describes how to manipulate it or work it in order to arrive at the total compensation. But then he points out that the special case which he has excepted is one in which the compensation is not based on the average weekly earnings, and that case is the case dealt with by the provisions of the early part of paragraph 1 (*a*) (i.), namely, where there has been a fatal accident in the case of a workman who has for three years preceding the accident been in the employment of the same employer; that is to say, the case which we now have before us. Then he goes on to say that in the special case to which he has referred there is no question of average at all "The Legislature may well have considered that, in a case where there has been three years' uninterrupted employment by the same employer in the same grade of employment, the most satisfactory solution of the difficult question of quantum of compensation would be to take facts as they stand and let the quantum be the reproduction of the actual earnings of that period." It has been argued here for the appellant that we must read that as being uninterrupted actual employment; that is to say, there must have been employment in every week of those three years. If that is the interpretation to be put upon it, the greater part has no sense at all, because it only means that if he has worked 156 weeks you take the 156 weeks. But it seems to me it means the opposite, and when the Lord Justice says "the most satisfactory solution of the difficult question of quantum of compensation would be to take facts as they stand" he means facts as they stand, taking in absence

C. A. 1915

GREENWOOD v. NALL & CO., LIMITED.

as well as presence, "and let the quantum be the reproduction of the actual earnings of that period."

That seems to me to be conclusive of this case, and upon that ground I agree the appeal should be dismissed.

WARRINGTON L.J. I agree. The workman in this case worked for the same employer for three years before the date of the fatal accident which happened to him on September 7 last year. The actual work during that period was interrupted by periods occasioned by illness or other unavoidable causes amounting altogether to about six months. The real question that we have to determine is whether under those circumstances he is to be treated as having been in the employment of the same employer during the three years next preceding the injury, or whether he is to be treated as if the period of his employment has been less than the said three years. In other words, is the interruption occasioned by illness or other unavoidable causes to be regarded in ascertaining whether he has been in the employment of the same employer for the full period of three years?

Now there is nothing in paragraph 1 itself which would enable one to say that the interruption by illness or unavoidable causes should be taken to reduce the period of three years. Paragraph 2 (*c*) has been relied upon as having that effect. That is in these terms: "employment by the same employer shall be taken to mean employment by the same employer in the grade in which the workman was employed at the time of the accident, uninterrupted by absence from work due to illness or any other unavoidable cause." This man's grade never altered at all. What is the meaning of the insertion of the words "uninterrupted by absence from work due to illness or any other unavoidable cause"? I think it means this, that you are to regard the period of his employment in the one grade, and for that purpose interruptions by absence from work due to illness or any other unavoidable cause are to be disregarded. That is the view I should have arrived at upon the construction of these provisions without reference to authority. But even if I had been inclined to take another view I should certainly not feel at liberty to express it, because I think, so far as this Court is concerned, the

Court is bound by the expression of opinion given by the Master of the Rolls and Fletcher Moulton L.J. in *Perry* v. *Wright*. (1) It seems to me on the point which we have to decide that paragraph in the judgment of the Master of the Rolls which has been referred to is conclusive. He uses this expression on p. 453: "Paragraph 2 (*c*) defines 'employment by the same employer.' Its language is very obscure, but I understand it to mean this: Any step up or any step down from one grade to another is to be regarded as commencing a fresh employment. But in calculating any of the periods mentioned in paragraph 1 you are to disregard absence due to illness or to causes beyond the control of the workman, and to reckon the employment as continuous notwithstanding any such absence." That seems to me to express exactly the view which I have tried to express in much feebler language.

The result is that the case falls in my opinion within the first part of paragraph 1 (*a*), sub-paragraph (i.), and that this man has been in the employment of the same employer during the three years next preceding the injury. Consequently the county court judge had nothing to do whatever with any average. He had simply to ascertain the amount of the earnings during those three years and then to give the amount of those earnings or the sum of 150*l*., whichever of those sums was the larger. That is the course the learned county court judge has taken. I think he was quite right, and that this appeal should be dismissed.

Appeal dismissed.

Solicitors: *T. A. Needham, Manchester; Nicholson, Graham & Jones, for Wood & Lord, Manchester.*

(1) [1908] 1 K. B. 441.

H. C. R.

C. A.
1915
Jan. 22;
March 3, 4, 24.

[IN THE COURT OF APPEAL.]

MASKELL *v.* HORNER.

[1913 M. 1512.]

Market—Tolls—Payment for many Years of Tolls demanded under Threat of Seizure of Goods—Payment under Protest—Subsequent Decision that Tolls were not leviable—Unlawful Demand—Mistake of Fact—Recovery of Payments—Action for Money had and received—Statute of Limitations.

From September, 1900, to June, 1912, the plaintiff carried on business as a dealer in produce in the vicinity of Spitalfields Market. As soon as he commenced business the defendant, who was the owner of the market, demanded tolls from him under threat of seizure of his goods if he refused to pay, and on the first occasion the plaintiff objected to pay and actual seizure took place. The plaintiff then consulted a solicitor, and upon learning that other dealers outside the market paid tolls he, acting upon the solicitor's advice, paid the tolls under protest, and, thereafter, he, or his agents acting upon his instructions, always paid the tolls under protest. Subsequently, whenever the plaintiff challenged the defendant's right, or disputed the amount of tolls, in particular cases there was a seizure or threat of seizure followed by payment under protest.

From the decision in *Attorney-General* v. *Horner* (No. 2) [1913] 2 Ch. 140, it appeared that the tolls had been unlawfully demanded, and, in consequence, the plaintiff brought this action for money had and received to recover the tolls so paid, claiming that he paid them (1.) under a mistake of fact and (2.) not voluntarily but under the pressure of seizure of his goods:—

Held by the Court of Appeal, affirming the decision of Rowlatt J. on this point, that the plaintiff did not pay under a mistake either of law or fact, but because he found that other sellers were paying tolls and he did not wish to be involved in litigation with the defendant, and that the plaintiff could not recover under this head of claim; but

Held, further (Pickford L.J. doubting), reversing the decision of Rowlatt J. on this point, that the circumstances of the payments and the conduct of the plaintiff throughout the period of years showed that he only paid to avoid seizure of his goods and never made the payments voluntarily, or intended to give up his right to the sums paid or close the transaction, and that he was entitled to recover under this head of claim the sums paid during the last six years immediately preceding this action, the earlier payments being barred by the Statute of Limitations.

APPEAL from an order of Rowlatt J. dismissing the plaintiff's action for money had and received by the defendant for the use of the plaintiff. The grounds of claim were (1.) that the plaintiff

had paid the money under a mistake of fact, and (2.) that he had paid it not voluntarily but under protest and to prevent seizure of his goods.

The action was a sequel to the decision of the Court of Appeal in *Attorney-General* v. *Horner* (No. 2) (1), in which, in April, 1913, it was held (inter alia) that the defendant Horner, the owner of Spitalfields Market, had no right in respect of a private market to overflow into the streets on days other than Thursdays and Saturdays, and that, in the absence of custom or prescription or individual contracts to the contrary, market tolls were payable by the buyers and not by the sellers.

The writ in the present action was issued on June 5, 1913.

The plaintiff was a dealer in produce and from September, 1900, to June, 1912, carried on business at 32, Lamb Street, in the vicinity of Spitalfields Market. The defendant was the owner of Spitalfields Market and from the very commencement of the business claimed tolls from the plaintiff. The plaintiff objected on the ground that he was not in the market and declined to pay and told the defendant that he would have to sue him for the tolls. The defendant thereupon told the plaintiff that if he did not pay he would seize his goods, and the plaintiff said that if his goods were seized he would bring an action, to which the defendant replied "If you do, I will get an injunction against you. I will shut you up"—meaning thereby that the plaintiff's business would be stopped. Actual seizure of the goods followed. The plaintiff thereupon consulted a solicitor and, acting under his advice and after finding out that all the other dealers outside the market were paying tolls, the plaintiff made the first and all subsequent payments under protest and instructed those acting under him always to pay the tolls under protest. On other particular occasions in 1902, 1903, 1905, and 1909 there were disputes between the plaintiff and defendant about tolls, which the plaintiff paid under protest upon the defendant threatening either to seize the goods or close the shop unless the tolls were paid. One of the witnesses at the trial said that the protests were continued and repeated until they became a joke.

(1) [1913] 2 Ch. 140.

C. A. 1915

MASKELL v. HORNER.

The defendant claimed these tolls before the goods were delivered to the buyers, and payment was made each day in respect of the tolls for the preceding day.

In his defence the defendant alleged that the tolls were rightly demanded and taken, or, alternatively, that the payments were made voluntarily under mistake of law and that the plaintiff had no cause of action; and pleaded the Statute of Limitations.

The defendant based his claim to demand the tolls upon (1.) the immemorial custom whereby the owner of Spitalfields Market levied and always had levied such tolls, (2.) the charter granted in 1682 by Charles II. to John Balch and his heirs, (3.) the charter granted in 1688 by James II. to John Bown and his heirs, and (4.) his ownership of the market. These grounds of claim had been the subject of decisions in *Attorney-General* v. *Horner* (1) and *Attorney-General* v. *Horner* (No. 2) (2) adverse to the general nature of the defendant's claim in this action.

The action was tried before Rowlatt J., and on February 21, 1914, his Lordship delivered judgment in which, after dealing with certain contentions not raised upon or material to this appeal, he proceeded as follows:—

ROWLATT J. Now I come to the real point in the case, and that is whether, these preliminary difficulties having been cleared away, and looking at the case upon the footing that those sums were not properly paid, the plaintiff can recover them back. Of course it goes without saying that it does not follow that where a sum has been paid which was not due, it can always be recovered back again afterwards. If that were so, there would be no finality in human affairs at all and no man would know, out of what he had in his pocket, what he was entitled to retain and what he had to pay back again. But the limits within which money can be recovered back have been well settled upon principles, and it is the application of those principles to this case that I have to consider. The plaintiff claims to recover these sums as paid under a mistake of fact, or, alternatively, as paid not voluntarily, but to prevent his goods being seized and under protest. I think it is necessary to state two principles of law to which he

(1) (1884) 14 Q. B. D. 245; (1885) 11 App. Cas. 66. (2) [1913] 2 Ch. 140.

appeals and then to see if the circumstances bring him within either. To recover under the first principle there must be a mistake of fact and a fact going to the supposed liability. That is laid down in *Kelly* v. *Solari* (1) and *Aiken* v. *Short*. (2) An action on this ground, therefore, can only be brought by one who pays, believing in his liability, because by mistake he believes a fact upon which his liability depends. Now the other principle is that which is explained in *Valpy* v. *Manley*. (3) It does not depend upon ignorance of facts. I was pressed with one sentence in the judgment of Tindal C.J., which was as follows: "I am not aware that there is any difficulty or impropriety in laying it down, that, where money is voluntarily paid, with full knowledge of all the circumstances, the party intending to give up his right, he cannot afterwards bring an action for money had and received; but that it is otherwise, where, at the time of paying the money, the party gives notice that he intends to resist the claim, and that he yields to it merely for the purpose of relieving himself from the inconvenience of having his goods sold." The words in that sentence "with full knowledge of all the circumstances" do not mean that ignorance of the circumstances assists a man on the ground I am now considering, but it means that if a person knows the circumstances he can only recover if he does not intend to give up his right and gives notice that that is his position at the time. An action can only be brought, upon the footing that I am now considering, by a person who I do not say believes, but who at any rate asserts the non-existence of his liability and pays on that footing and not on the footing of acquiescence. If a person pays merely upon the threat of an action, he cannot recover the money back. He should await the action and try the question. There is no reason why he should not. By paying he acquiesces, and interest rei publicae ut sit finis litium; but if, for instance, he cannot pass a bridge or get his goods carried by railway or protect his property from seizure, or if non-payment would injure the credit of a party to a bill whose credit he is bound to maintain—all these are instances found in the cases—then he

(1) (1841) 9 M. & W. 54. (2) (1856) 1 H. & N. 210.
(3) (1845) 1 C. B. 594.

1914

MASKELL v. HORNER.

Rowlatt J.

may pay without being said to acquiesce if he makes it clear that he does not and that he is not giving way and closing the transaction. If this statement of the two principles is correct, it would seem that a plaintiff who appeals to both of them together and at the close of the argument still presents his case alternatively, not having decided whether his situation was that of one acquiescing under mistake or repudiating upon an assertion of a truth, is in some dialectical embarrassment. However, I will proceed to examine the facts from both points of view successively.

First, as to the mistake of fact. The first question is, what did he mistake? One must see what his mistake was before one can determine whether it was a mistake of fact such as is required. Now the evidence was that when this gentleman came and took his premises, a demand of toll was made upon him, which surprised him. He did not appreciate that he had to pay; he objected to pay, and he was told that he must pay or his goods would be seized. He said he would bring an action if his goods were seized. Then it was said, "I will get an injunction against you, I will shut you up"; which meant somehow or other that his business would be stopped. Then he consulted a solicitor and he was told to pay and he was told that everybody was paying, and so he paid. That is the evidence on the first occasion, and that is really the evidence as to his governing attitude throughout. Now from that it appears that what led the plaintiff to pay was his ascertaining that others were paying. That is his evidence. That was not a mistake at all. It appears to have been true, and no doubt led him to the further conclusion that there was a liability. That was a mistake, but it seems to me that that is not precise enough. How can I tell whether it was a mistake of law or fact? If it is correct, as laid down in the cases which I have mentioned, that there must be a mistake as to a fact on which the liability depends, it seems to follow that the mistake must be more specific than a mistake as to the final upshot of liability or non-liability. The truth of the matter in this case is, as I regard the case, that the plaintiff did not understand why he was liable. He found that other people paid, so he paid. You cannot lay your finger on his mistake. All you can say is, he paid when he need not have done so. That is

always a mistake but is not such a mistake as will enable him to recover the money.

There is the further point that the protest on which he laid so much stress showed that, according to his own account, he was not under any impression of liability at all: so far from being under a misapprehension he was very much alive to his position. He did not, therefore, pay under any mistake at all in my view.

Now turning to the other view that is presented, can he recover as for money paid involuntarily and under protest? Upon the evidence I think that something such as he describes occurred at the commencement of his career at 32, Lamb Street. The defendant's witnesses have forgotten it, but I think something of that sort, substantially as he describes it, did occur. On the other hand, I do not feel at all convinced that with regard to subsequent occasions there was any pointed protest against payment of tolls in principle. I have very little doubt there were disputes and protests as to amounts. I may say at once that if the protests were, as one of the witnesses said, continued and repeated until they became a joke, that proves far too much for the plaintiff's case, because the protests passing into a standing joke passed out of the sphere of effective protests; they came to indicate a grumbling acquiescence and were not what they must be to satisfy the rule that there must be a declaration that the transaction was not closed but that the payment, which was only made for the relief of a deadlock, was to be reclaimed. There is no magic in the use of a protest, though I strongly suspect the plaintiff and his witnesses of thinking when they gave their evidence that there was. It may mean, I think it did mean, at any rate after the lapse of some time, that the plaintiff merely objected to payment, not that he kept the question alive. This has been left to sleep for twelve years. The books containing the earlier payments have been destroyed with the priceless records of these amounts debited to the plaintiff, and I can only conclude that the transaction was regarded as closed and payments acquiesced in. This in my view is the sense of the matter whichever way the case is looked at. The plaintiff did not want to challenge the defendant's right, though he was ready enough to claim his money back when some one else had shown that the

1914

MASKELL v. HORNER.

Rowlatt J.

money was wrongly claimed. I put to the defendant's counsel the case of Windsor Bridge. For years and years passengers paid tolls; they did not like it, but they supposed, wrongly, that they had to pay. They never dreamt of testing it until one fine day some one arose who did test it and showed that no tolls were due. Is it to be said that every one who had passed over the bridge for the last six years could recover his halfpenny back? In my view both common sense and common law forbid any such claim. The transactions were closed and left closed without any substantial statement.

For these reasons I think that judgment must be given for the defendant.

The plaintiff appealed and the appeal was heard on January 22 and March 3 and 4, 1915.

Schwabe, K.C., and *G. A. H. Branson*, for the appellant. The appellant seeks to recover back the tolls paid during the six years preceding action brought on the grounds (1.) that they were paid under a mistake of fact, and (2.) that they were paid involuntarily under pressure.

As to the first ground, the law as to the recovery of money paid under a mistake of fact is laid down by Parke B. in *Kelly* v. *Solari*. (1) The mistake of fact here was that the plaintiff believed that the defendant had a right to require him to pay market tolls. "It is said, 'Ignorantia juris haud excusat'; but in that maxim the word 'jus' is used in the sense of denoting general law, the ordinary law of the country. But when the word 'jus' is used in the sense of denoting a private right, that maxim has no application. Private right of ownership is a matter of fact; it may be the result also of matter of law; but if parties contract under a mutual mistake and misapprehension as to their relative and respective rights, the result is that that agreement is liable to be set aside as having proceeded upon a common mistake": per Lord Westbury in *Cooper* v. *Phibbs*. (2) The same principle was laid down in *Earl Beauchamp* v. *Winn*. (3)

(1) 9 M. & W. 54, at p. 58. (2) (1867) L. R. 2 H. L. 149, at p. 170.
(3) (1873) L. R. 6 H. L. 223, at p. 234.

Those cases show that money paid under an erroneous belief that the defendant had the right to take tolls from the plaintiff can be recovered back as having been paid under a mistake of fact. The defendant's right to tolls depends upon charters. Rowlatt J. held that Maskell paid because others were paying, and that that was not a mistake of fact. But in so holding he was confusing the reason of a mistake with the mistake. It is said by the defendant that there was a mistake on a question of law, on which the plaintiff could not recover, that question being whether Horner was entitled to take tolls from both buyer and seller or from one only. But even so the plaintiff is entitled to succeed.

The plaintiff can also recover on the ground that the payment by him was not voluntary: *Valpy* v. *Manley.* (1) If a man pays in order to avert an evil, that is sufficient to entitle him to recover, without his saying whether or not he intends to preserve his right of remedy: *Parker* v. *Great Western Ry. Co.* (2); *Great Western Ry. Co.* v. *Sutton* (3); *Lancashire and Yorkshire Ry. Co.* v. *Gidlow* (4); *Fraser* v. *Pendlebury* (5); *Morgan* v. *Palmer* (6); *Waterhouse* v. *Keen.* (7)

The judgment of Rowlatt J. was wrong and ought to be reversed.

Upjohn, K.C., and *Ralph Sutton* (for *Viscount Tiverton*, now serving with His Majesty's Forces), for the respondent. When one person calls upon another to pay, alleging that he is under a legal obligation to pay, prima facie the person on whom the demand is made must make up his mind, at the time when the demand is made, whether he is going to pay or not. He can litigate if he pleases. But if he pays, prima facie, he has no right to get the money back: *Fulham* v. *Down.* (8) If he believes he is not liable, and even makes a protest, but yet pays, he cannot recover: *Brisbane* v. *Dacres.* (9)

There are two grounds which may alter the prima facie

(1) 1 C. B. 594.
(2) (1844) 7 Man. & G. 253.
(3) (1869) L. R. 4 H. L. 226.
(4) (1875) L. R. 7 H. L. 517.
(5) (1861) 31 L. J. (C.P.) 1.
(6) (1824) 2 B. & C. 729.
(7) (1825) 4 B. & C. 200.
(8) (1798) 6 Esp. 26, n.
(9) (1813) 5 Taunt. 143.

C. A. 1915

MASKELL v. HORNER.

proposition that a person who pays cannot recover. One is that he has paid under a mistake of fact. The other is that he has paid under a species of duress. On the evidence here Maskell paid because he did not want a lawsuit. That is not paying under duress. The sole reason he paid was that he did not wish to fight. In those circumstances he is not entitled to recover. If a person is to recover on the ground of mistake of fact, the mistake must be as to a specific fact, and must be such a mistake of fact as, if it were not a mistake but true, would render him liable to pay: *Kelly* v. *Solari* (1); *Aiken* v. *Short* (2); *Rogers* v. *Ingham* (3); *Cooper* v. *Phibbs* (4); *Earl Beauchamp* v. *Winn*. (5) Here the plaintiff has not proved that there was a mistake of any specific fact. The mistake was that he thought that tolls were payable at common law, not by the buyer, but by the seller—which is a question as to a general rule of law—whereas at common law they are payable by the buyer: *Attorney-General* v. *Horner* (No. 2). (6)

Both *Cooper* v. *Phibbs* (4) and *Earl Beauchamp* v. *Winn* (5) were cases in Chancery arising upon documents either made in mutual mistake or of doubtful construction, and the Court of Equity gave relief, but in *Rogers* v. *Ingham* (3) the Court pointed out that, although the Court of Equity has power to relieve against mistake of law as well as against mistake of fact, the rule of law was that money paid with a full knowledge of all the facts although under a mistake of law on the part of both parties could not be recovered back, and the Court of Equity would not in such cases interfere with the Courts of law. The equitable doctrine of relief in cases of mistake of law has nothing to do with an action for money had and received. It was held in *Brisbane* v. *Dacres* (7) that money paid with full knowledge of the facts but in ignorance of the law could not be recovered.

With regard to the second ground upon which the appellant bases his claim, namely, that the payment was involuntary, the appellant had a choice either to litigate or pay, and if he submits

(1) 9 M. & W. 54.
(2) 1 H. & N. 210.
(3) (1876) 3 Ch. D. 351.
(4) L. R. 2 H. L. 149.
(5) L. R. 6 H. L. 223.
(6) [1913] 2 Ch. 140.
(7) 5 Taunt. 143.

to the demand and pays he gives the money to the payee and closes the transaction and cannot recover it back: per Gibbs J. in *Brisbane* v. *Dacres*. (1) The only exceptions to that rule are cases in which the money is paid under urgent and pressing necessity accompanied by such protest or notice, whether expressed in words or implied from circumstances or from the conduct of the payer, that it is brought home to the mind of the payee that the transaction is not thereby closed and that the payer reserves the right to rip it up afterwards: *Fulham* v. *Down* (2); *Valpy* v. *Manley* (3); *Snowdon* v. *Davis* (4); *Parker* v. *Great Western Ry. Co.* (5); *Fraser* v. *Pendlebury* (6); *Waterhouse* v. *Keen* (7); *Great Western Ry. Co.* v. *Sutton* (8); *Lancashire and Yorkshire Ry. Co.* v. *Gidlow*. (9) In the two last mentioned cases the House of Lords' Records of Cases have been examined and both show that the payments were made under protest. There was nothing whatever in the present case to bring to the mind of the defendant or his bailiff the impression that the plaintiff was only paying the toll under an urgent and pressing necessity and under such protest as not to close the transaction but to reserve the right to reopen the payments. For twelve years these payments were made under the alleged protests by which the plaintiff said in effect "I pay rather than fight," and they amounted to what Rowlatt J. called a grumbling acquiescence, and do not bring the payer within the doctrine in *Valpy* v. *Manley*. (3) In any event the Statute of Limitations bars the recovery of any of the payments previous to June, 1907.

Further, payment of tolls under an actual or threatened seizure of goods is analogous to payment of a debt in an action or in consequence of a threat of action, which latter payment cannot be recovered but is always regarded as a voluntary payment, and the defendant submits that seizure for unpaid tolls should be regarded as corresponding to the issue of a writ and

(1) 5 Taunt. 143, 152.
(2) 6 Esp. 26, n.
(3) 1 C. B. 594.
(4) (1808) 1 Taunt. 359.
(5) 7 Man. & G. 253.
(6) 31 L. J. (C.P.) 1.
(7) 4 B. & C. 200.
(8) L. R. 4 H. L. 226.
(9) L. R. 7 H. L. 517.

C. A. 1915

MASKELL v. HORNER.

the payments made in consequence of or to avoid the seizure should be regarded as voluntary payments not recoverable in an action for money had and received: *Knibbs* v. *Hall* (1); *Lindon* v. *Hooper* (2); *Gulliver* v. *Cosens.* (3)

Schwabe, K.C., in reply. It is not disputed that these payments were made under protest and Rowlatt J. so found. But it is quite plain that each of the payments was made under terror of seizure, and that of itself is quite enough to entitle the plaintiff in an action for money had and received to recover the money so paid: per Lord Chelmsford in *Lancashire and Yorkshire Ry. Co.* v. *Gidlow* (4); *Morgan* v. *Palmer* (5), in which there was no suggestion of any protest; per Byles J. in *Fraser* v. *Pendlebury.* (6)

[LORD READING C.J. referred to *Atlee* v. *Backhouse.* (7)]

There Lord Abinger C.B. and Parke B. stated very clearly that in all cases where payment of money not due has been enforced by unlawful seizure the payer can recover it back in an action for money had and received. A threat of seizure has the same effect in this respect as an actual seizure: *Valpy* v. *Manley.* (8) There is no authority that there must also be any such protest, declaration, or notice as that for which the respondent contends.

This was a mistake of fact on the part of the plaintiff. He thought that by reason of some existing facts he was liable to pay the defendant. He knew nothing about the charter. The cases which say that money paid with full knowledge of all the facts but in ignorance of law cannot be recovered do not help the defendant.

Cur. adv. vult.

March 24. LORD READING C.J. From the year 1900 till 1912 the plaintiff carried on business at Spitalfields Market as a dealer in produce and the defendant throughout this period demanded and received payment by the plaintiff of market tolls on goods sold by the plaintiff in the market. It was decided by the Court of Appeal in *Attorney-General* v. *Horner*

(1) (1794) 1 Esp. 84.
(2) (1776) Cowp. 414.
(3) (1845) 1 C. B. 788.
(4) L. R. 7 H. L. 517, 527.
(5) 2 B. & C. 729.
(6) 31 L. J. (C.P.) 1, 3.
(7) (1838) 3 M. & W. 633.
(8) 1 C. B. 594.

(No. 2) (1) that the defendant Horner was not entitled to demand tolls from the sellers, and it follows from this decision, which has not been and could not be challenged in this Court, that the plaintiff was never under legal obligation to pay tolls to the defendant. The plaintiff having, during this period of years, paid a number of small sums of money as market tolls to the defendant, now sues to recover these sums as money had and received by the defendant to the use of the plaintiff. The action came for trial before Rowlatt J., who decided in favour of the defendant, and the plaintiff appeals to this Court for a reversal of this judgment.

The question is whether the plaintiff made these payments in such circumstances as entitle him to recover them from the defendant in an action at law for money had and received. The claim is put on two grounds. (1.) That the plaintiff paid the sums under a mistake of fact. (2.) That he paid them not voluntarily but under the pressure of seizure of his goods.

I will deal first with the claim under a mistake of fact. It is an essential condition of the plaintiff's right to recover under this head that he should establish that he paid the money in the belief that a fact was true which was untrue. That fact is that at the time of the payments the defendant was entitled to exact market tolls from the plaintiff. When the demand was first made the plaintiff at once consulted his solicitor and, acting upon the advice given to him, made the first payment and all subsequent payments under protest. Rowlatt J. has found upon this and other evidence before him that the plaintiff did not make these payments under the impression that the defendant was entitled to demand them from him. Upon an examination of the evidence in this case I have arrived at the same conclusion. I am satisfied that he did not pay in the belief that he was liable to the defendant, but because he found that other sellers in the market had paid and were paying these tolls to the defendant and because he was, at least, in doubt as to his liability to pay these tolls and did not wish to be involved in litigation with the defendant. Therefore, even assuming that such mistake was one of fact and not of law, the plaintiff cannot recover under

(1) [1913] 2 Ch. 140.

C. A. 1915

MASKELL v. HORNER.

Lord Reading C.J.

this head. Able and interesting arguments were addressed to us for and against the view that a mistake as to the ownership of private rights is regarded in law as a mistake of fact. As I have come to the conclusion that the plaintiff did not pay under a mistake, it becomes unnecessary to decide whether such mistake was of fact or of law. I express no opinion on the point.

Upon the second head of claim the plaintiff asserts that he paid the money not voluntarily but under the pressure of actual or threatened seizure of his goods, and that he is therefore entitled to recover it as money had and received. If the facts proved support this assertion the plaintiff would, in my opinion, be entitled to succeed in this action.

If a person with knowledge of the facts pays money, which he is not in law bound to pay, and in circumstances implying that he is paying it voluntarily to close the transaction, he cannot recover it. Such a payment is in law like a gift, and the transaction cannot be reopened. If a person pays money, which he is not bound to pay, under the compulsion of urgent and pressing necessity or of seizure, actual or threatened, of his goods he can recover it as money had and received. The money is paid not under duress in the strict sense of the term, as that implies duress of person, but under the pressure of seizure or detention of goods which is analogous to that of duress. Payment under such pressure establishes that the payment is not made voluntarily to close the transaction (per Lord Abinger C.B. and per Parke B. in *Atlee* v. *Backhouse*. (1)) The payment is made for the purpose of averting a threatened evil and is made not with the intention of giving up a right but under immediate necessity and with the intention of preserving the right to dispute the legality of the demand (per Tindal C.J. in *Valpy* v. *Manley* (2)). There are numerous instances in the books of successful claims in this form of action to recover money paid to relieve goods from seizure. Other familiar instances are cases such as *Parker* v. *Great Western Ry. Co.* (3), where the money was paid to the railway company under protest in order to induce them to carry goods which they were refusing to carry except at

(1) 3 M. & W. 633, 646, 650. (2) 1 C. B. 594, 602, 603.
(3) 7 Man. & G. 253.

rates in excess of those they were legally entitled to demand. These payments were made throughout a period of twelve months, always accompanied by the assertion that they were made under protest, and it was held that the plaintiffs were entitled to recover the excess payments as money had and received, on the ground that the payments were made under the compulsion of urgent and pressing necessity. That case was approved in *Great Western Ry. Co.* v. *Sutton* (1), when the judges were summoned to the House of Lords to give their opinion. Willes J., in stating his view of the law, said: "When a man pays more than he is bound to do by law for the performance of a duty which the law says is owed to him for nothing, or for less than he has paid, there is a compulsion or concussion in respect of which he is entitled to recover the excess by condictio indebiti, or action for money had and received. This is every day's practice as to excess freight." That is a clear and accurate statement in accordance with the views expressed by Blackburn J. in the same case and adopted by the House of Lords. It treats such claims made in this form of action as matters of ordinary practice and beyond discussion. (See also per Lord Chelmsford in *Lancashire and Yorkshire Ry. Co.* v. *Gidlow*. (2))

This principle of law is so well settled that it cannot be challenged, and I find nothing in *Brisbane* v. *Dacres* (3) to the contrary. Indeed the general proposition of law is not disputed; but it was contended, and the learned judge found, that the plaintiff had not brought himself within it, mainly because (1.) the payments were not accompanied by a declaration or assertion to the defendant that the plaintiff did not intend to give up his right to recover the money, and (2.) the protests for a period of years had degenerated into a sort of grumbling acquiescence and were ineffective. I doubt whether Rowlatt J. intended to find that there must be anything in the shape of an express notice or declaration to the defendant of the plaintiff's intention to keep alive his right to recover. It is clear, and was indeed admitted at the Bar, that no express words are necessary and that the

(1) L. R. 4 H. L. 226, 249. (2) L. R. 7 H. L. 517, 527.
(3) 5 Taunt. 143.

C. A. 1915

MASKELL v. HORNER.

Lord Reading C.J.

circumstances attending the payments and the conduct of the plaintiff when making them may be a sufficient indication to the defendant that the payments were not made with the intention of closing the transactions. I do not think that the mere fact of a payment under protest would be sufficient to entitle the plaintiff to succeed; but I think that it affords some evidence, when accompanied by other circumstances, that the payment was not voluntarily made to end the matter.

At the beginning of the dispute there was a definite assertion of right by the defendant to recover the tolls and a denial of that right by the plaintiff followed by an actual seizure of goods of the plaintiff. The plaintiff, upon the advice of his solicitor, then made the payment under protest. Subsequently, and during the long period of years whenever the plaintiff challenged the defendant's right, there was seizure or a threat of seizure of the plaintiff's goods. A threat intended to be followed by seizure is equivalent for this purpose to a seizure. (See per Cresswell J. in *Valpy* v. *Manley*. (1)) Disputes arose both as to the right to exact the tolls and as to the amount in particular cases. Notable instances occurred in 1902, 1903, 1905 and 1909. The disputes always ended either in seizure or a threat to seize, and the plaintiff then paid under protest. The defendant from the first asserted his right to recover payment of the tolls by a distress levied upon the plaintiff's goods, and if the defendant was legally entitled to the tolls he could enforce payment by these means. It appears to me upon the evidence that the plaintiff throughout the whole period of years believed that if he did not pay his goods would be seized. No doubt, as time progressed, and the protests were frequently repeated, they were at times made by the plaintiff's servants to the defendant's servants in a laughing and jocular manner. The plaintiff had, however, given definite instructions that payments were never to be made except under protest, and these instructions were invariably followed. I cannot think that the protests lost their effectiveness by reason of the length of period during which they were persistently made, or because they were at times accompanied by a laugh or jest. The persistence during so long a period serves rather to

(1) 1 C. B. 594, 606.

show that the plaintiff would not acquiesce in the defendant's demands.

I come to the conclusion that the plaintiff never intended to depart, and never did depart, from the course taken by him at the commencement of the dispute. In order to preserve his right to recover, it is not, in my opinion, necessary that on every occasion there should be a refusal to pay by the plaintiff followed by seizure. It was not necessary to go through this form. The circumstances of these payments and the conduct of the plaintiff throughout the period of years satisfy me that he never made the payments voluntarily, that he never intended to give up his right to recover the sums paid, and that he only paid because he knew that a refusal to pay would be immediately followed by seizure of his goods, as in fact did happen whenever he disputed the defendant's right and refused to pay. The pressure of seizure was always present to his mind, and never ceased to operate upon it whenever demand for tolls was made. I am also satisfied that the circumstances of the payments and the conduct of the plaintiff were a sufficient indication to the defendant that the plaintiff did not intend to give up his right to recover. If any assertion or declaration of his intentions was necessary it was made to the defendant at the time and in the circumstances of the payments.

Needless to say I should not differ on inferences of fact from Rowlatt J. if I thought these inferences depended upon the demeanour of witnesses. Where there was a conflict of evidence Rowlatt J. believed the plaintiff's witnesses; but he drew inferences from which I feel bound to differ.

One further point remains to be considered. Mr. Sutton, on behalf of the defendant, contended that a payment of tolls under an actual or threatened seizure of goods should be treated like payment of a debt in an action or in consequence of a threat of action. There is no doubt that if a person pays in an action or under threat of action the money cannot be recovered by him, as the payment is made to avoid the litigation to determine the right to the money claimed. Such payment is not made to keep alive the right to recover it, inasmuch as the opportunity is thus afforded of contesting the demand, and payment in such

C. A. 1915

MASKELL v. HORNER.

Lord Reading C.J.

circumstances is a payment to close the transaction and not to keep it open. Even if the money is paid in the action accompanied by a declaration that it is paid without prejudice to the payer's right to recover it, the payment is a voluntary payment, and the transaction is closed. (See *Brown* v. *M'Kinally.*(1)) It is argued that as unpaid tolls can be recovered by distress levied upon the goods of the person who fails to pay, the seizure is to be regarded like the issue of a writ, and therefore that a payment of tolls on seizure must be treated as a voluntary payment. I cannot agree with this contention. When goods are seized, the owner can only relieve them from seizure by payment. He has no opportunity of contesting the right to demand tolls from him except by allowing the seizure and detention of his goods to continue, or by making payment to protect them. Three cases were cited to us in support of this contention: *Knibbs* v. *Hall*(2); *Lindon* v. *Hooper*(3); *Gulliver* v. *Cosens.*(4) Upon examination it will be found that they were decided in the main upon points of pleading and procedure. So far as they may be said to establish a proposition of general application, it is that where the distress levied has been for an excessive amount the appropriate remedy is by replevin and not by action for money had and received. In any event I do not think that these cases modify the broad and general principle of law stated by such eminent authorities in the cases to which I have already called attention. It is worthy of observation that in *Atlee* v. *Backhouse*(5) Lord Abinger C.B. gave as an instance of the right to recover for money had and received the case of a party whose goods have been seized on a demand for toll and more than is due is exacted and is paid to relieve the property from seizure. The present is a case a fortiori since the right to demand tolls was in itself in dispute, apart from amount.

The result is that in my opinion this appeal succeeds and the plaintiff is entitled to recover the sums paid by him to the defendant for tolls during the last six years immediately preceding this action, the earlier payments being barred by the Statute of

(1) (1795) 1 Esp. 278.
(2) 1 Esp. 84.
(3) Cowp. 414.
(4) 1 C. B. 788.
(5) 3 M. & W. 633, 646.

Limitations. If the parties can come to terms, judgment will be entered for the plaintiff for the agreed amount, failing agreement for an account to be taken. In my judgment the appeal must be allowed with costs.

BUCKLEY L.J. I do not rest my decision in this case upon mistake of fact. The mistake which the plaintiff alleges is that he believed, contrary to the fact, that the defendant was legally entitled to demand tolls from him. I reserve my opinion as to whether such a question is a question of fact. Assuming that it is, I think upon the evidence that the plaintiff made payment, not because he thought that he was liable to pay, but because he was not sure whether he was liable to pay or not, and he was not prepared to fight the question whether the liability in fact existed.

But the plaintiff is entitled, I think, to recover upon the ground that the payments which he made were not made voluntarily, but were made under the pressure of the defendant's threat to seize and sell his goods in default of payment and were made not without objection but under protest. Mr. Upjohn in his argument largely rested his case upon the judgment of Gibbs J. in *Brisbane* v. *Dacres* (1), and contended that that learned judge meant to lay down as a general proposition that under circumstances such as those in the present case the party called upon to make payment has an option either (1.) to litigate the question or (2.) to submit and pay, and that if he does the latter, the payment is by way of gift to the person to whom he pays and closes the transaction between them. Mr. Upjohn argued that that proposition is true in law. In my opinion it is not the fact that there exist only those two alternatives of which the person called upon to make payment must elect one, and that if he elects to pay, his payment is by way of gift and is voluntary. To say that it is a gift and is voluntary seems to me to beg the question. He may submit (in the sense of making the payment) because the consequences to himself will be so disagreeable if he does not pay that he prefers to pay and prevent the seizure of his goods, but may at the same time reserve the right to contend that the

(1) 5 Taunt. 143.

C. A. 1915

MASKELL v. HORNER.

Buckley L.J.

money has been obtained from him against his will. In *Atlee* v. *Backhouse* (1) Lord Abinger said that in cases where property has been unlawfully seized or unlawfully detained for the purpose of enforcing the payment of money not due, "the party against whom the goods have been wrongfully seized or detained, is entitled, after payment of the money, to bring an action for money had and received," and Parke B., referring to an argument by Mr. Erle, which will be found at p. 642 of the report, said (2): "There is no doubt of the proposition laid down by Mr. Erle, that if goods are wrongfully taken, and a sum of money is paid, simply for the purpose of obtaining possession of those goods again, without any agreement at all, especially if it be paid under protest, that money can be recovered back; not on the ground of duress, because I think that the law is clear, although there is some case in Viner's Abridgment to the contrary, that, in order to avoid a contract by reason of duress, it must be duress of a man's person, not of his goods; and it is so laid down in Sheppard's Touchstone:—but the ground is, that it is not a voluntary payment. If my goods have been wrongfully detained, and I pay money simply to obtain them again, that being paid under a species of duress or constraint, may be recovered back."

The same is true, I think, when payment is made not to release goods seized but to intercept a threat to seize them. When the defendant demanded payment of the plaintiff, the latter, if he refused payment, exposed himself to the seizure and sale, rightfully or wrongfully, of his goods. When he made payment to escape such seizure and sale, the payment was, I think, within Parke B.'s words, not a voluntary payment. Further, if there be added to the above facts the further fact that the party making the payment protests that the money is being wrongfully taken from him, a further factor is added which goes to show that the payment was not voluntary.

The conclusion at which I arrive as to the facts in the present case is this. There is no question but that in September, 1900, the payment of tolls was demanded by the defendant as matter of right, that the plaintiff refused to pay, that the defendant

(1) 3 M. & W. 633, 646. (2) Ibid. 650.

threatened seizure and sale if he did not pay, that seizure in fact was made, and that thereupon the plaintiff paid under protest. In subsequent years, 1902, 1903, 1905, and 1909, similar threats and protests were made, but not as to tolls in general. The contest in each case was whether particular tolls demanded were for too large an amount or whether particular tolls were demandable at all for certain parcels of goods. It seems to me that the threat of 1900 remained a subsisting threat governing all the payments made, and the fact that the particular threat and protest in the later years were made as regards amount or description of goods is in no way inconsistent with a continuing threat and protest as to all classes of goods. The threat was made as regards particular goods based upon an assertion of a right as regards all goods. I am not at all impressed by the fact that the protests were said in course of time to have been regarded very much as matter of form, and to have become the subject of jesting expressions as between the collector of the defendant who came to demand payment and the servant of the plaintiff whom he saw. It is obvious, I think, that the plaintiff's attitude throughout was that he was not prepared to enter into litigation with such a person as Mr. Horner. But I do not find that he ever acquiesced in his demands with any such result as that his conduct amounted to a closing of the transaction between the two parties upon the footing that, whether the defendant was right or wrong, the plaintiff was minded to pay. The fact is that the defendant never was entitled to the tolls which the plaintiff in fact paid. Except as regards the last six years, the Statute of Limitations is a bar; but the plaintiff is, I think, entitled to recover within the period of the statute upon the ground that the payments which he made were made under what Parke B. in *Atlee* v. *Backhouse* (1) called a species of duress or constraint. Upon that ground I think that this appeal must be allowed, and judgment given for the plaintiff.

PICKFORD L.J. In this case the plaintiff sued to recover back money paid by him to the defendant for tolls. It has been

(1) 3 M. & W. 633.

C. A. 1915

MASKELL v. HORNER.

Pickford L.J.

determined in the case of *Attorney-General* v. *Horner* (No. 2) (1) that the defendant had no right to charge these tolls.

The plaintiff based his claim on two grounds. (1.) That he paid under a mistake of fact, that is, a mistaken belief that the defendant had a right to payment of the tolls. (2.) That the payments were made involuntarily to prevent seizure of his goods, and under protest. The two grounds seem to me inconsistent. If the plaintiff paid under the belief that the defendant had a right to the tolls it is difficult to see why he waited for compulsion to make him pay and why he protested. But there is no reason why they should not be set up as alternative grounds of claim.

I am of opinion that the plaintiff did not pay under any mistake at all. I think he knew that the defendant's right to the tolls was of a doubtful nature and that other persons were paying and that he was not prepared to enter upon litigation to decide the question, but I do not think he ever was actuated in his payments by a belief that he was liable.

It is not, therefore, necessary to decide whether such a mistake, if it existed, would have been a mistake of fact or of law.

The second ground of claim is that the payments were not voluntary payments, but were made under protest and to avoid seizure of the plaintiff's goods. I do not think that the mere fact that a payment is made under protest is enough to entitle the payer to recover it back, but if it be shown that it was made under circumstances which show that the payer intends to resist the claim and yields to it merely for the purpose of relieving himself from the inconvenience of having his goods sold the money can be recovered back, and the fact of a protest is some indication that it is so made.

I do not think there need be an express notice or declaration of the intention to resist if it is properly indicated by all the circumstances.

Payment to avoid a seizure or (subject to a point taken by the defendant's counsel) a threatened seizure is an involuntary payment and can be recovered back: *Valpy* v. *Manley*. (2)

The point taken on behalf of the defendant was that as distress

(1) [1913] 2 Ch. 140. (2) 1 C. B. 594.

was the legal remedy for non-payment of tolls, a threat to distrain was like a threat to bring an action, and a payment made in consequence of it could not be recovered back in an action for money had and received. In support of this contention *Knibbs* v. *Hall* (1), *Lindon* v. *Hooper* (2), and *Gulliver* v. *Cosens* (3) were cited. I do not think these cases support the proposition. So far as they are not decisions upon points of pleading and forms of action not now material they only decide that in the case where there is a right to distrain but a complaint that there was a distress for too much, replevin and not money had and received is the proper remedy.

No case was cited to us in which it was held that money paid under a threat to distrain when the person threatening had no right whatever to do so could not be recovered back in such an action, and I see no principle which obliges us so to hold. It is also contrary to the dictum of Lord Abinger in *Atlee* v. *Backhouse*. (4) The case therefore resolves itself into a question of fact. Did the plaintiff make these payments under what has been called a quasi duress of goods, that is, to preserve them from a threatened seizure. I have great doubts not altogether removed whether the plaintiff has proved that they were so paid, or whether, looking at all the circumstances, the length of time over which the transactions extended, the fact that after the first dispute the only threatened seizures were in respect not of disputes as to the general right to claim tolls but as to matters relating to amount or other matters peculiar to the particular goods, the plaintiff had not really acquiesced in the defendant's right and allowed his protests to become merely what Rowlatt J. calls a grumbling acquiescence.

I do not, however, dissent from the conclusion arrived at by the other members of the Court.

Appeal allowed.

Solicitors: *H. E. Tudor*; *E. Betteley.*

(1) 1 Esp. 84.
(2) Cowp. 414.
(3) 1 C. B. 788.
(4) 3 M. & W. 633.

R. M.

C. A.

1915
May 7, 10, 11, 12.

[IN THE COURT OF APPEAL.]

ASSOCIATED NEWSPAPERS LIMITED AND OTHERS, APPELLANTS *v.* MAYOR, ALDERMEN AND COMMONS OF THE CITY OF LONDON, RESPONDENTS (No. 2).

Rates—Exemption from Taxes and Assessments—City of London—General Rate—Consolidated Rate—Police Rate—7 Geo. 3, c. 37, s. 51—City of London Police Act, 1839 (2 & 3 *Vict. c. xciv.*)—*City of London Sewers Act*, 1848 (11 & 12 *Vict. c. clxiii.*)—*City of London (Central Criminal Court House) Act*, 1904 (4 *Edw. 7, c. xciii.*)—*City of London (Union of Parishes) Act*, 1907 (7 *Edw. 7, c. cxl.*).

By s. 51 of the statute 7 Geo. 3, c. 37, it was provided that certain lands reclaimed from the river Thames should vest in the adjoining owners "free from all taxes and assessments whatsoever."

Before the passing of that Act there had been passed an Act of 10 Geo. 2, c. 22, for better regulating the nightly watch and bedels within the city of London, which required the Corporation of the City to appoint watchmen and bedels for each of the City wards, and to give directions as to their arming, duties, and wages; and to order and direct the attendance of constables every night at each ward; and for the better raising and levying of moneys for paying the wages of the watchmen and bedels and other charges incident thereto, to direct the aldermen and common councilmen of each ward to make an equal rate and assessment upon all persons who should inhabit, hold, occupy, or enjoy any land, house, shop, warehouse, or other tenement within their respective wards.

Before the City of London Police Act, 1839, was passed there were acting within the City night watchmen paid out of the watch rate, 120 policemen paid out of the City's cash and not out of rates, and constables chosen from the wards and not paid.

The City of London Police Act, 1839, was passed to repeal the Act of 10 Geo. 2, c. 22, in order to render still more effective a certain system of police established instead of a nightly watch. By s. 58 it was enacted that a just and equal pound rate should be made upon every person who should inhabit, hold, occupy, possess, or enjoy any house within the several wards or within any precinct or place within the boundaries of such wards or adjoining thereto, whether such person should be then liable in respect of such house to be assessed to the relief of the poor, or be not liable to be assessed to the relief of the poor in respect thereof by reason of such house being situated in any precinct or extra-parochial place.

Both before and after the statute of 7 Geo. 3, c. 37, numerous Acts had been passed relating to the paving, cleansing, and lighting of streets in the city of London.

By s. 168 of the City of London Sewers Act, 1848, there was

established a rate to be called the consolidated rate for making, maintaining, keeping in repair, paving, lighting, sweeping, cleansing, and watering the streets, and for making improvements and constructing, altering, repairing, and cleansing the sewers within the City, and for otherwise maintaining effectually the wholesome sewerage and drainage of the City, and defraying wages and all other incidental costs and expenses attending the execution of the powers thereby given. By s. 169 of the Act the rate was to be made upon every person who should inhabit, hold, occupy, possess, or enjoy any house or building within the City whether such person should be then liable in respect of such house or building to be assessed to the relief of the poor, or be not liable to be assessed to the relief of the poor in respect thereof by reason of any such house or building being situated in any precinct or extra-parochial place or otherwise, according to the full net annual value thereof.

C. A. 1915

ASSOCIATED NEWSPAPERS LIMITED v. CITY OF LONDON CORPORATION.

By the City of London (Union of Parishes) Act, 1907, s. 15, certain rates including the police rate and the consolidated rate were to be assessed, made, levied, and collected as one rate to be termed the general rate.

In a general rate made by the respondents the appellants, who were occupiers of land and hereditaments reclaimed under the statute 7 Geo. 3, c. 37, as aforesaid, were rated thereto in respect of those lands. The general rate was made for (1.) expenses of paving, cleansing, lighting, improvements, and sanitary charges, and (2.) expenses in respect of police. It being admitted that the general rate might be analysed into its component parts:—

Held, that the appellants were liable to pay both that part of the general rate which represented the consolidated rate, namely, so much as was made for the expenses of paving, cleansing, lighting, &c., and also that part which was made for expenses in respect of the police, both being substantially new rates.

Sion College v. *London Corporation* [1901] 1 K. B. 617 followed.

Decision of the Divisional Court [1914] 2 K. B. 822 affirmed in part and reversed in part.

APPEAL and cross-appeal from the decision of a Divisional Court upon a case stated under s. 11 of the Quarter Sessions Act, 1849 (12 & 13 Vict. c. 45); reported [1914] 2 K. B. 822.

The appellants duly gave notice of appeal to the general quarter sessions of the peace for the city of London against a general rate made by the respondents on April 6, 1911. Afterwards, by consent of the parties and by order of a judge, a special case was stated for the opinion of the King's Bench Division of the High Court of Justice, the parties agreeing that a judgment in conformity with the decision of the Court, and for such costs as the said Court

C. A. 1915

ASSOCIATED NEWSPAPERS LIMITED v. CITY OF LONDON CORPORATION.

should adjudge, should be entered on motion by either party at the sessions next or next but one after such decision should have been given.

In a "general rate" made by the respondents on April 6, 1911, the several appellants were rated thereto in respect of the several hereditaments occupied by them within the area of land reclaimed under statute 7 Geo. 3, c. 37, as hereinafter appears. The appellants jointly gave a notice of appeal against the rate.

The facts relating to the several hereditaments, so far as material to this case, and the considerations of law affecting the questions raised herein for the opinion of the Court were the same as far as each of the appellants was concerned. It was therefore agreed between the parties for the sake of convenience to take as a specimen case for the purposes of stating this special case and for the purposes of argument thereon the hereditament numbered, described, and assessed in the rate as follows :—

GENERAL RATE.

No. of Assessment.	Name of Occupier.	Owner.	Name or Situation of Property.		Description of Property.	Gross Value.	Rateable Value.	Amount of Rate at $9\frac{1}{2}d.$ in the £.	*Note.*—Amount claimed $9\frac{1}{2}d.$ in the £ being less $\frac{3}{16}d.$ for Sewerage and Drainage and $\frac{3}{16}d.$ for Ward Expenses.
			Street.	No. or Name of House.					
1.	2.	3.	5.	6.	7.	8.	9.	25.	26.
12,734	Various.	City and West End Properties Company, Limited.	Bridge (part), Queen Victoria Street.	House 181,	Shops and Offices that part included within the area of land reclaimed under 7 George 3, c. 37.	£ 724	£ 604	£ s. d. 23 18 2	£ s. d. 22 19 $3\frac{1}{2}$

The hereditament so numbered, described, and assessed is hereafter referred to as "the said hereditament." But it was agreed that the decision of the Court upon the questions raised in the special case should apply to all the several appellants and to all the several hereditaments which were all to be deemed to be the subject-matter of the case.

The said hereditament is situated in an area of land reclaimed from the river Thames under the powers granted for that purpose by 7 Geo. 3, c. 37, s. 51 of which is as follows: "And be it further enacted, that the ground and soil of the said river so to be inclosed and embanked in the front of every such respective wharf or ground (and which shall be bounded on the east and west sides thereof by straight lines running, at right angles, to and upon the said intended front line) shall vest and the same is hereby vested in the owner or owners, proprietor or proprietors, of such adjoining wharf or ground, according to his, her, or their respective estates, trusts, or interests therein, free from all taxes and assessments whatsoever."

The said hereditament is a portion of the ground and soil so vested by the statute 7 Geo. 3, c. 37, and the owners thereof, the City and West End Properties, Limited, are the successors in title of the persons in whom such portion of the ground and soil was originally vested.

The "general rate" appealed against was made, so far as regards purposes not included under sewerage and drainage or ward expenses, to raise moneys required by the respondents for the following purposes, namely:—

(1.) Expenses of paving, cleansing, lighting, improvements, and sanitary charges other than those of sewerage or drainage at the rate of $5\frac{3}{16}d.$ in the pound.

(2.) Expenses under the City of London (Central Criminal Court House) Act, 1904, at the rate of $\frac{6}{16}d.$ in the pound.

(3.) Expenses in respect of police at the rate of $3\frac{7}{16}d.$ in the pound.

(4.) Other expenses of Common Council not payable out of the poor rate at the rate of $\frac{2}{16}d.$ in the pound.

The above enumeration of purposes is taken from the back of the demand note for the rate. A copy of this demand note, which was to form part of the case, together with the material sections of the Acts 10 Geo. 2, c. 22, the City of London Police Act, 1839, the City of London Sewers Act, 1848, and the City of London (Union of Parishes) Act, 1907, will be found in the appendix to the report of this case in the Court below.

As regards police expenses, before the passing of the statute

C. A. 1915

ASSOCIATED NEWSPAPERS LIMITED v. CITY OF LONDON CORPORATION.

7 Geo. 3, c. 37, there had been passed an Act of 10 Geo. 2, c. 22, for better regulating the nightly watch and bedels within the city of London and the liberties thereof. By s. 1 of this Act the Mayor, Aldermen, and Commons of the City in Common Council assembled were required to order and appoint what number of watchmen and bedels they should judge necessary and proper to be kept within each of the City wards; to direct how they ought to be armed, how long they were to watch, and what wages and allowances should be given them for their attendance; to order and direct what number of constables should attend every night at each ward; to make such other orders as the nature of each particular service should seem to require; and by s. 2, for the better raising and levying of moneys for paying the wages of the said watchmen and bedels and other charges incident thereto, to direct the alderman, deputy, and common councilmen of each ward to make an equal rate and assessment upon all persons who should inhabit, hold, occupy, or enjoy any land, house, shop, warehouse, or other tenement within their respective wards (regard being had to the abilities of and to the rent paid by the said several inhabitants and occupiers so to be rated and assessed).

Before the City of London Police Act, 1839, was passed there were three separate forces acting within the City:

(1.) Watchmen appointed by the ward authorities who did duty at night and were paid by the ward out of the watch rate;

(2.) 120 policemen regulated by the aldermen and paid for out of the City's cash and not out of rates as follows:—2 marshals, 6 marshalsmen, 4 police officers in attendance at the justice rooms, 2 attendants at the Mansion House to look after vagrants, 1 attendant at the justice room, 6 men—one at each of the 6 stations, 1 superintendent of police acting under a City marshal who acted as principal of the day police, 3 inspectors, 10 sergeants, and 85 police constables; and

(3.) Constables elected at wardmotes. These were chosen from the wards and were not paid. They had to sit up by night in the watch houses to receive charges from the watchmen. They were allowed, however, to serve by substitutes, whom the constables paid, there being no charge on the rate or on the City's cash.

The City of London Police Act, 1839, was passed to repeal the Act of 10 Geo. 2, c. 22, in order to render still more effective a certain system of police which had been established instead of a certain nightly watch. By s. 58 of this Act a just and equal pound rate shall be made upon every person who shall inhabit, hold, occupy, possess, or enjoy any house within the several wards, or within any precinct or place within the boundaries of such wards, or adjoining thereto, and not included within the limits of the Metropolitan Police district, whether such person shall be now liable in respect of such house to be assessed to the relief of the poor, or be not liable to be assessed to the relief of the poor in respect thereof by reason of such house being situated in any precinct or extra-parochial place. By s. 2 "house" includes land; by s. 66 unoccupied houses are rateable at one half of the rate; and by s. 70 public buildings (with certain exceptions) and vacant land are rateable at a sum per square yard.

With regard to the expenses of paving, cleansing, lighting, &c., the following Acts relating to the paving, cleansing, and lighting of streets in the city of London had been passed before the Act of 7 Geo. 3, c. 37, namely, 13 & 14 Car. 2, c. 2; 19 Car. 2, c. 3; 22 & 23 Car. 2, c. 17; 2 W. & M. sess. 2, c. 8; 7 Anne, c. 9; 9 Geo. 2, c. 20; 10 Geo. 2, c. 22; 17 Geo. 2, c. 29; 33 Geo. 2, c. 30; 6 Geo. 3, c. 26. The following Acts for similar purposes were passed after 7 Geo. 3, c. 37, namely, 8 Geo. 3, c. 21; 11 Geo. 3, c. 29; 33 Geo. 3, c. 75; 4 Geo. 4, c. cxiv.; and the City of London Sewers Act, 1848, amended by the City of London Sewers Act, 1851 (14 & 15 Vict. c. xci.), and the City of London Sewers Act, 1897 (60 & 61 Vict. c. cxxxiii.).

By s. 168 of the City of London Sewers Act, 1848, rates were to be made for the purposes of the Act, one called "the sewer rate," and the other called "the consolidated rate," the latter rate being for the purpose of making, maintaining, keeping in repair, paving, lighting, sweeping, cleansing, and watering the streets, and making improvements in the City, and of constructing, altering, repairing, and cleansing the sewers within the City, and for otherwise maintaining effectually the wholesome sewerage and drainage of the City. By s. 169 every such

C. A. 1915

ASSOCIATED NEWSPAPERS LIMITED v. CITY OF LONDON CORPORATION.

rate was to be made upon every person who should inhabit, hold, occupy, possess, or enjoy any house or building within the City, or partly within and partly without the City (whether such person should be then liable in respect of such house or building to be assessed to the relief of the poor, or be not liable to be assessed to the relief of the poor in respect thereof by reason of such house or building being situate in any precinct or extra-parochial place or otherwise), according to the full net annual value thereof respectively.

With regard to the expenses under the City of London (Central Criminal Court House) Act, 1904, by s. 3 of that Act the expenses of the provision and erection of the court house were payable by means of money borrowed upon the security of the consolidated rate, and the expenses and costs were to be deemed to be costs and expenses attending the execution of the powers given by the City of London Sewers Acts, 1848, 1851, and 1897.

By the City of London (Union of Parishes) Act, 1907, s. 15, sub-s. 1, the sewer rate, consolidated rate, and police rate, and another rate known as the "trophy tax," were to be assessed, made, levied, and collected together by the Common Council as one rate to be termed the general rate, and were to be assessed, made, collected, and levied as if it were the consolidated rate. By sub-s. 4, the expenses of the Common Council (other than those provided for by the section of the Act of which the marginal note is "Poor Rate"—s. 18) were so far as the same were payable out of rates leviable within the city of London to be paid out of the general rate.

The appellants contended that by virtue of the statute 7 Geo. 3, c. 37, they were not rateable to the general rate or to any portion thereof; and that, if rateable to any part of that rate, they were not liable to pay the amount applicable for police purposes.

The respondents contended (1.) that the statute 7 Geo. 3, c. 37, only exempted the premises in question from taxes and assessments in existence at the date of that statute, and that the consolidated rate imposed by the City of London Sewers Act, 1848, being a substantially new rate, and being intended by that Act to be imposed upon the premises, did not come

within the exemption; and (2.) that the police rate was a substantially new rate, and therefore not within the exemption.

The questions for the Court were:—

(1.) Whether the appellants were liable to pay the sums assessed upon them by the general rate; (2.) whether, if they were liable to pay any portion of the general rate, they were liable to pay such portion thereof as was made to raise any sum required for police purposes.

The Divisional Court (Channell, Scrutton, and Bailhache JJ.) held, as to so much of the general rate as was made for the expenses of paving, cleansing, lighting, &c., upon the authority of *Sion College* v. *London Corporation* (1), that the appellants were liable; but they held (Scrutton J. doubting), as to so much of the rate as was made for expenses in respect of police, that the appellants were not liable. (2)

The appellants appealed to the Court of Appeal, and the respondents gave notice of cross-appeal.

Sir R. B. Finlay, K.C., and *Macmorran, K.C.* (*Konstam* with them), for the appellants. The appellants are not liable to pay the consolidated rate. It was admitted in the Divisional Court, upon the authority of *Islington Borough Council* v. *London School Board* (3), that the general rate can be analysed into its component parts. The first point is that s. 51 of 7 Geo. 3, c. 37, is perfectly general, and exempts the appellants from all taxes and assessments of a local nature, and not merely from those existing at that date or others substituted for them. The decision of the Court of Appeal in *Sion College* v. *London Corporation* (1) to the effect that the exemption only applies to then existing taxes and assessments proceeded upon a misapprehension of the earlier decisions in *Williams* v. *Pritchard* (4), *Eddington* v. *Borman* (5), *Perchard* v. *Heywood* (6), and *Rex* v. *London Gas Light Co.* (7) The only judge who said that the exemption applied to then existing taxes and to others substituted for them was Bayley J.

(1) [1901] 1 K. B. 617.
(2) [1914] 2 K. B. 822.
(3) [1903] 2 K. B. 354.
(4) (1790) 4 T. R. 2.
(5) (1790) 4 T. R. 4.
(6) (1800) 8 T. R. 468.
(7) (1828) 8 B. & C. 54.

C. A. 1915

ASSOCIATED NEWSPAPERS LIMITED v. CITY OF LONDON CORPORATION.

in *Rex* v. *London Gas Light Co.* (1), and that was only a dictum. *London Corporation* v. *Netherlands Steamboat Co.* (2) tends to show that the ground of the decision in the *Sion College Case* (3) can no longer be relied upon. Nor can the decision in the *Sion College Case* (3) be supported upon the ground upon which the Divisional Court put it (4), namely, that the words "or otherwise" in s. 169 of the City of London Sewers Act, 1848,—which imposed the consolidated rate upon every person occupying a house whether such person was liable to be assessed to the relief of the poor in respect of such house or was not liable by reason of such house being "in any precinct or extra-parochial place or otherwise"—had the effect of repealing the exemption in the earlier Act. In *London Corporation* v. *Netherlands Steamboat Co.* (5) Lord Halsbury L.C. said: "It is hopeless to contend that the Sewers Act of 1848 took away the privilege thus granted." In the same case Lord Davey said (6): "The language of the 169th section is not sufficiently explicit to repeal by implication an express statutory exemption in the earlier Acts, and ought not to be so construed." It may be, however, that this Court will feel bound by the decision in the *Sion College Case.* (3)

Next, assuming that the decision in the *Sion College Case* (3) is right, the present case does not come within it. In that case it was held that the exemption in s. 51 of 7 Geo. 3, c. 37, only applied to then existing taxes and assessments or to others substituted for them, and that the consolidated rate made under the City of London Sewers Act, 1848, was substantially a new assessment, and was therefore not within the exemption. At the date of that decision the education expenses, a new charge of a large amount, were payable out of the consolidated rate. Since the Education Act, 1902 (2 Edw. 7, c. 42), they are payable out of the poor rate, and not out of the consolidated rate: *Associated Newspapers Limited* v. *London Corporation* (No. 1). (7) The purposes therefore for which the consolidated rate, which is now levied as part of the general rate, is made are substantially

(1) 8 B. & C. 54.
(2) [1906] A. C. 263.
(3) [1901] 1 K. B. 617.
(4) [1900] 2 Q. B. 581.
(5) [1906] A. C. at p. 268.
(6) Ibid. at p. 271.
(7) [1914] 2 K. B. 603; [1915] A. C. 674.

the same as those for which rates were made at the time when the exemption was enacted. This appears clear from the Acts which were passed before the Act of 7 Geo. 3, c. 37, and which are mentioned in the special case. The present consolidated rate is therefore substantially an old rate, that is to say, a rate for purposes which were in existence in 1766 when 7 Geo. 3, c. 37, was passed, and the decision in *Sion College* v. *London Corporation* (1) is on that ground distinguishable, and does not apply to the present consolidated rate.

Further, if it be the fact that new burdens, not existing in 1766, have since that date been imposed upon the consolidated rate, that does not alter the exemption created by the Act of 1766. It is analogous to the case of the poor rate where the exemption from liability is not affected by the fact that new burdens have been cast upon it: *Associated Newspapers Limited* v. *London Corporation* (No. 1). (2)

With regard to the expenses under the City of London (Central Criminal Court House) Act, 1904, they are imposed upon the consolidated rate, and the same reasoning as applies to the consolidated rate applies to them. With regard to the other expenses of the Common Council not payable out of the poor rate, they are payable under s. 15, sub-s. 4, of the City of London (Union of Parishes) Act, 1907. Though payable as part of the general rate, they are all in their nature old expenses and the purposes are old. It is admitted that the appellants are not liable to pay the sewer rate.

G. Cave, K.C., and *Ryde, K.C.* (*Boydell Houghton* with them), for the respondents, the Corporation, were not called upon to argue the appeal. With regard to the cross-appeal, the police rate made under the City of London Police Act, 1839, is a new rate. It is clear from the decisions in *Williams* v. *Pritchard* (3), *Eddington* v. *Borman* (4), *Perchard* v. *Heywood* (5), and *Rex* v. *London Gas Light Co.* (6) that the exemption in s. 51 of 7 Geo. 3, c. 37, only applies to then existing taxes and assessments and to

(1) [1901] 1 K. B. 617.
(2) [1914] 2 K. B. 603; [1915] A. C. 674.
(3) 4 T. R. 2.
(4) 4 T. R. 4.
(5) 8 T. R. 468.
(6) 8 B. & C. 54.

C. A. 1915

ASSOCIATED NEWSPAPERS LIMITED v. CITY OF LONDON CORPORATION.

those substituted for them. In *Rex* v. *London Gas Light Co.* (1) Bayley J. treats the exemption as "analogous to a covenant to pay taxes which applies to old taxes or others substituted for them, but not to taxes entirely new." *Hopwood* v. *Barefoot* (2) and *Vestry of Mile End* v. *Whitby* (3) are instances of covenants applying to old rates or taxes only. As A. L. Smith M.R. said in *Sion College* v. *London Corporation* (4), "the Act only created an exemption from taxes and assessments then in existence, and not from substantially new ones coming into existence at a later date." The police rate under the City of London Police Act, 1839, is a substantially new rate. The old watch rate under 10 Geo. 2, c. 22, was a ward rate for a nightly watch, whereas the Act of 1839 established a new police force for day and night duty under a commissioner of police and gave the police much more extended powers, and the rate which is levied over the whole of the City is for a day and night police. It was not until shortly before 1839 that the Corporation established a special body of day police, who were paid for out of the City's cash, there being no power to make a rate in respect thereof. The rate levied under s. 58 of the Act of 1839 does not merely take the place of the rate levied under 10 Geo. 2, c. 22. The police established by that Act took the place both of the watchmen appointed under 10 Geo. 2, c. 22, and also of the policemen and constables in existence when the Act of 1839 was passed. It is therefore a new rate different from the rate authorized by 10 Geo. 2, c. 22. It is a rate imposed upon every person who occupies or possesses a house (which by s. 2 includes land) within the City whether he is liable in respect of such house to be assessed to the relief of the poor or not. The rate is not levied by reference to the poor rate; by s. 66 unoccupied houses are rateable, and by s. 70 vacant land is rateable. The words in s. 58, "whether such person shall be now liable in respect of such house to be assessed to the relief of the poor, or be not liable to be assessed to the relief of the poor in respect thereof by reason of such house being situate in any precinct or extra-parochial place," do not limit the rate to persons who are liable

(1) 8 B. & C. 54.
(2) (1709) 11 Mod. 237.
(3) (1898) 78 L. T. 80.
(4) [1901] 1 K. B. at p. 621.

to the poor rate or would be so liable if their houses were not extra-parochial. They are words of extension and not words of limitation, and are not intended to cut down the generality of the earlier words. The cases of *In re Pickup's Trusts* (1) and *In re Greaves' Settlement* (2) are illustrations of this. The old ward rate was imposed upon the inhabitants of the ward according to their ability to pay. The rate under the Act of 1839 is imposed upon the occupiers and possessors of houses according to annual value and upon vacant land. The purposes of the rates are different, and they are levied on different persons. The rate under the Act of 1839 is not an old rate levied under new machinery. The old rate was swept away and a new rate imposed. It is not like the poor rate which remains the same however many new burdens may be imposed upon it. [Pulling's Laws and Customs of the City of London, pp. 138 et seq., and *Mersey Docks* v. *Cameron* (3) were also referred to.]

The expenses under the City of London (Central Criminal Court House) Act, 1904, are clearly new charges, to be levied by reference to the consolidated rate, and with regard to the small item of "other expenses of the Common Council not payable out of the poor rate," it is by s. 15, sub-s. 4, of the City of London (Union of Parishes) Act, 1907, payable out of the general rate, and is a new charge.

Sir R. B. Finlay, K.C., and *Macmorran, K.C.* (*Konstam* with them) contra. The police rate is an old rate for purposes in existence when the Act of 1766 (7 Geo. 3, c. 37) was passed. The Act of 10 Geo. 2, c. 22, was passed for the purpose of maintaining order in the City. The Act of 1839 was passed for the same purpose. The powers conferred upon the police by the later Act are more extensive than those conferred upon the nightly watch by the earlier Act, but their characteristics remain the same. The police rate established under the Act of 1839 was substituted for the old ward rate within the language of Bayley J. in *Rex* v. *London Gas Light Co.* (4), which was approved in *Sion College* v. *London Corporation* (5), and therefore the exemption in the Act of 1766

(1) (1861) 1 J. & H. 389.
(2) (1883) 23 Ch. D. 313.
(3) (1865) 11 H. L. C. 443.
(4) 8 B. & C. 54, at p. 62.
(5) [1901] 1 K. B. 617.

C. A. 1915

ASSOCIATED NEWSPAPERS LIMITED v. CITY OF LONDON CORPORATION.

applies to it. As the recital in the Act states, the object of the Act is to render the system of police more effective. The purpose of the rate must be looked at, and the purpose of the present police rate is the same as that of the old ward rate, though more extended and improved. It is in this respect like the poor rate which remains the same rate though it has been altered and extended, and new burdens imposed upon it. Further, the test of rateability under s. 58 of the Act of 1839 is whether the premises are rateable to the poor rate. The words of that section "whether such person shall be now liable in respect of such house to be assessed to the relief of the poor, or be not liable to be assessed to the relief of the poor in respect thereof by reason of such house being situate in any precinct or extra-parochial place," mean that the person must be rateable to the relief of the poor or would be so rateable if the house were not situate in an extra-parochial place. Inasmuch as the land is exempt from the poor rate, it never became liable to be rated to the police rate. The judgment of the Divisional Court as to the police rate is therefore right.

Ryde, K.C., in reply on the cross-appeal.

SWINFEN EADY L.J. This is an appeal from the judgment of the Divisional Court, and there is a cross-appeal by the Corporation. The question raised has reference to a rate levied and collected under the City of London (Union of Parishes) Act, 1907. By an Act passed in 1766, 7 Geo. 3, c. 37, power was given to reclaim certain land from the river Thames which was to vest in the persons therein specified "free from all taxes and assessments whatsoever." The appellants contend that by reason of that exemption they are not liable to pay that part of the general rate levied under the Act of 1907 which is the consolidated rate made under the City of London Sewers Act, 1848. They failed upon this point in the Divisional Court, and they appeal here. They also claim exemption from the police rate, and in this they have succeeded in the Divisional Court, and on this point the Corporation appeals.

By s. 15, sub-s. 1, of the City of London (Union of Parishes) Act, 1907, "On and after the appointed day the sewer rate, consolidated rate, and police rate, and any rate leviable for the

purpose of defraying the necessary charges and incidental expenses of the militia under the Act, 1 George IV., cap. 100 (commonly known and hereinafter referred to as 'the Trophy Tax'), shall be assessed, made, levied and collected together by the Common Council as one rate which shall be termed the general rate, and shall be assessed, made, collected and levied as if it were the consolidated rate, and subject to the provisions of this Act all enactments applying or referring to the consolidated rate shall (with the exception that the said rate shall be assessed, made and levied by the Common Council for the whole of the said City, and not by the alderman or his deputy and the major part of the Common Councilmen of each ward within the said City) be construed as applying or referring to the general rate, but nothing in this section shall authorize the Common Council to levy a greater rate in the pound for the purposes of the City of London Sewers Act, 1848, and the City of London Police Act, 1839, and the Acts amending the same respectively than is authorized under such Acts. Provided always that the amount in the pound which the Common Council may levy in respect of the respective portions of the general rate which represent the sewer rate, the consolidated rate, and the police rate respectively shall be the same as the amount in the pound which might have been levied in respect of each of those rates respectively if this Act had not passed." Sub-s. 4 provides that "The expenses of the Common Council (other than those provided for by the section of this Act of which the marginal note is 'Poor Rate') shall so far as the same are now payable by means of or out of any rates leviable within the city of London be paid out of the general rate to be made from time to time by the Common Council under this Act." The only other section to which it is necessary to refer is s. 35: "Nothing in this Act, or in any scheme to be made under this Act, shall confer or derogate from or otherwise affect any exemption or deduction from or allowance out of any rate to which this Act relates or any privilege of or provision for being rated on any exceptional principle of valuation."

Therefore under s. 15, sub-s. 1, of this Act the Corporation are empowered to raise as one rate the old sewer rate, the consolidated rate, the police rate, and the trophy tax, and they are to be levied

C. A. 1915

ASSOCIATED NEWSPAPERS LIMITED v. CITY OF LONDON CORPORATION.

Swinfen Eady L.J.

in the manner prescribed. There is power, under sub-s. 4, to pay the additional expenses of the Corporation out of the moneys raised by the rate; but the power to rate is in respect of the four old rates, the sewer rate, the consolidated rate, the police rate, and the trophy tax.

It was conceded in the Divisional Court, and it is conceded for the purposes of this appeal, that the rate described as the "general rate" is to be treated as divisible, that is to say, as if the rates included therein were separate rates and not one entire rate. It was recently decided in this Court and in the House of Lords in *Associated Newspapers Limited* v. *London Corporation* (No. 1) (1) that the poor rate is one indivisible rate, but it is admitted on behalf of the Corporation that, though the four rates are raised as one general rate, no doubt for the purpose of saving expense in collection and for convenience of administration, the legal position is not affected by the four rates being so raised. In that case Lord Sumner, dealing with the contention that the poor rate could be severed, said (2): "Apart from cases in which it is admitted that two or more existing rates have merely been joined together for purposes of collection, as if they were, what they nevertheless are not, one single rate, I cannot see how this contention can be supported."

Accordingly I approach this case by taking the several rates of which the general rate is composed, and I proceed to consider whether the appellants are liable to pay the consolidated rate. The items are (1.) expenses of paving, cleansing, lighting, improvements, and sanitary charges other than those of sewerage and drainage, at the rate of $5\frac{3}{16}d.$ in the pound; (2.) expenses under the City of London (Central Criminal Court House) Act, 1904, at the rate of $\frac{6}{16}d.$, which are charged on the consolidated rate; and (3.) other expenses of the Common Council not payable out of the poor rate, at the rate of $\frac{2}{16}d.$, which must be charged on and payable out of one or other of the rates in question in this case.

It is contended by the appellants in the first place that the exemption "free from all taxes and assessments whatsoever" in 7 Geo. 3, c. 37, s. 51, applies generally to all future taxes and

(1) [1914] 2 K. B. 603; [1915] A. C. 674. (2) [1915] A. C. at p. 699

assessments as well as to those existing at the date of the Act. This point is not open to argument before us. In the next place it is said that the purposes for which the present consolidated rate is made, namely, repairing, paving, lighting, cleansing and watering the streets within the City, and maintaining and cleansing sewers and drains and other similar purposes, are substantially the same as those for which rates were made when 7 Geo. 3, c. 37, was passed; that, if the exemption did not apply to future taxes and assessments, it applied to existing taxes and assessments and to those substituted for them; that the present purposes of the consolidated rate, though they might be enlarged and their scope made wider, were substituted for the old purposes, and were substantially the same; and that, if it were not possible for this Court to review the case of *Sion College* v. *London Corporation* (1), at all events the present case was distinguishable from it. The decision in the *Sion College Case* (1) was that the rate created and imposed by the City of London Sewers Act, 1848, was substantially a new rate at its creation. It was argued that the case merely decided that the rate as it existed at the time when it came before the Court was substantially a new rate, especially having regard to the fact that the heavy charges for education were then raised as part of the consolidated rate; but when the case is examined closely I think it is clear that, although the education charge was at that date borne by the consolidated rate, the ground of the decision of the Court of Appeal was, not that the rate had become a substantially new rate by reason of additional burdens having been imposed upon it in course of time, but that when created under the Act of 1848 it was substantially a new rate. In the Court of Appeal the additional burden of education was not referred to by any member of the Court. There was just a reference to it by Grantham J. in the Divisional Court (2), but the decision in that Court proceeded on other grounds. In the Court of Appeal the Master of the Rolls said: "I agree that in it are some incidents which would appertain to the old rates in existence in 1766, but I cannot look at the wide purposes of the consolidated rate without seeing that it was"—that must mean when it was

(1) [1901] 1 K. B. 617. (2) [1900] 2 Q. B. at p. 584.

C. A. 1915

ASSOCIATED NEWSPAPERS LIMITED v. CITY OF LONDON CORPORATION.

Swinfen Eady L.J.

originally imposed—"substantially a new rate." Collins L.J. said: "It seems to me, looking at the numerous subject-matters embraced in that rate, which were not known when the earlier Act came into existence, the inference is that the consolidated rate is a new rate, and not the less so because it embraces some things incident to the earlier rates." Romer L.J. said: "We have, therefore, to consider whether the consolidated rate established under the Act of 1848 was substantially a new assessment." The language to which I have referred obviously has reference to the position of the rate at the date when the Act of 1848, under which it was levied, was passed, and not to the position in which the rate was at the time when the *Sion College Case* (1) arose in 1900.

In these circumstances this Court is bound by the decision of the Court of Appeal with regard to the consolidated rate, and it is not open to us to consider the propriety of the decision. Nor is it open to us to distinguish it upon the ground that the decision was upon the rate as it then existed, having regard to the burdens then imposed upon it, and that since that date there has been a material change because the charge for education is no longer borne by that rate, but is payable out of the county rate which in turn is charged upon the poor rate. None of these points are open, having regard to the grounds upon which the Court in the *Sion College Case* (1) based its judgment, and in these circumstances I am of opinion, so far as the consolidated rate is concerned, that the appeal fails, and that the appellants are liable to pay that rate, including the expenses under the City of London (Criminal Court House) Act, 1904, which are charged upon the consolidated rate.

I have not considered in detail the item of other expenses of the Common Council not payable out of the poor rate. The legal position of those expenses seems to me to be as follows: In so far as any of the expenses referred to in s. 15, sub-s. 4, of the City of London (Union of Parishes) Act, 1907, are properly payable out of the consolidated rate, as the appellants are liable to pay the consolidated rate they are liable to pay and must bear their share of any expenses properly payable out of that rate.

(1) [1901] 1 K. B. 617.

The other expenses of the council are not a new charge levied for the first time under a new liability imposed by the general rate, but are to be borne in proper proportion by such of the four rates specified in s. 15, sub-s. 1, of the Act of 1907 as the expenses are properly attributable to.

The second question arises upon the cross-appeal by the respondents, the Corporation, with regard to the police rate. In the Divisional Court the appellants succeeded upon the ground that the police rate was a rate for an old purpose, and that, the purpose of the rate being the test, the rate was in substance an old rate and the appellants were exempt from paying it. No doubt the police rate is in a sense a rate for an old purpose. It is a rate levied for the purpose of enforcing obedience to the law and for the maintenance of order within the City. That is so speaking generally, but when the position before the police rate was imposed by the City of London Police Act, 1839, is looked at it becomes apparent how different the present position is.

Under 10 Geo. 2, c. 22, provision was made for establishing a nightly watch within the City. It was a watch by night only and not by day, and the watchmen and bedels were to be paid by a ward rate, a separate rate being levied in each ward in the City. There were also constables who took the charges. In the course of time it was manifest that that system was insufficient, and a police force grew up in the City regulated by the aldermen and paid for out of the City's cash. That force existed side by side with the night watchmen appointed by the ward authorities, and in the schedule to the special case the position before the Police Act, 1839, is set out. There were watchmen appointed by the ward authorities, who did duty at night and were paid by the ward out of the watch rate. There were 120 policemen who were regulated by the aldermen and paid for out of the City's cash, and there were constables who were elected at ward-motes. These latter were chosen from the wards and were not paid. They had to sit up by night in the watch houses to receive charges from the watchmen, but they were allowed to serve by substitutes whom the constables paid, there being no charge on the rate or on the City's cash. In other words, the persons who were elected constables at the wardmotes had the

C. A. 1915

ASSOCIATED NEWSPAPERS LIMITED v. CITY OF LONDON CORPORATION.

Swinfen Eady L.J.

obligation of serving either by themselves or by deputy. That was the old position. By the Act of 1839 a police force was established. It was a force, much enlarged, for day and night duty, with special powers given to the police as described in the Act, and provision was made for their payment, one fourth being contributed by the City and the other three fourths being raised by the police rate in question.

In these circumstances the conclusion is that the police rate levied under the Act of 1839 for the purpose of maintaining this substantially new body of police is in substance a new rate, and cannot be said to be the old rate or a rate merely substituted for the old rate. No doubt some of the purposes for which the new rate is levied are the same as those of the old watch rate, including the keeping of order in the City by night. It may be that the new rate is a development of the old rate, but it is in substance a new rate, and having regard to the grounds on which the Court of Appeal proceeded in *Sion College* v. *London Corporation* (1), that the consolidated rate was a substantially new rate, I am unable, treating that case as a binding authority, to take a different view with regard to the police rate. In my opinion it is substantially a new rate.

It is next said that, having regard to the language of the Act of 1839, the appellants are not liable to pay this rate because it is only imposed upon persons who are liable to be rated to the poor rate, and that, inasmuch as under the decision of this Court and of the House of Lords in *Associated Newspapers Limited* v. *London Corporation* (No. 1) (2) they are not liable to be rated to the poor rate, they are not liable to be rated to the police rate. The language of the Acts under consideration in the two cases is not the same. In the present case the test of rateability is not whether the person is liable to be assessed to the poor rate; there is no restriction to persons liable to pay the poor rate. The various sections of the Act show that the incidence of this police rate is intended to be different from and more extensive than the incidence of the poor rate, inasmuch as provision is made for rating hereditaments which were not then and are not now liable to be rated to the poor rate. Vacant

(1) [1901] 1 K. B. 617. (2) [1914] 2 K. B. 603; [1915] A. C. 674.

land and empty houses are to be rated. Therefore this rate is not restricted to those persons who are liable to pay the poor rate. For these reasons the cross-appeal should be allowed.

The result is that the appeal with regard to the consolidated rate will be dismissed, and the cross-appeal with regard to the police rate will be allowed.

C. A. 1915

ASSOCIATED NEWSPAPERS LIMITED v. CITY OF LONDON CORPORATION.

PHILLIMORE L.J. It is settled, so far as this Court is concerned, and I think it will be difficult to reopen the question in the House of Lords, that the Act of 7 Geo. 3, c. 37, conferred no exemption from future taxes and assessments, and, that being so, I can see no conflict in principle between the decisions in *Sion College* v. *London Corporation* (1) and in *Associated Newspapers Limited* v. *London Corporation* (No. 1). (2) Taking the latter case first, the broad principle laid down is that where there is an old rate the exemption attaches no matter how many new charges are put upon it. If it is the poor rate, the fact that charges not exactly germane to the poor rate have been imposed upon it, as they have for a great number of years, does not make it the less the poor rate. If it is an old sewers rate, the fact that certain other duties are imposed upon those who administer the sewers of the city of London and the expenses thereof thrown upon the sewers rate does not make the rate the less the sewers rate, though the amount thereof may be largely increased. That I conceive to be the principle of the decision of the House of Lords, affirming the decision of this Court. (2) Where on the other hand there is a new rate there is no exemption. As to what may be a new rate there may be a good deal of dispute. If the name only of the rate were changed, it would not be considered a new rate. If the distinction were merely colourable, it would not be considered a new rate. With those two propositions laid down the rest becomes a question of degree. It is settled by *Sion College* v. *London Corporation* (1) that the test is whether the rate is substantially a new assessment, and the Court of Appeal in applying that test held that the consolidated rate authorized under the City of London Sewers Act, 1848, though it included some purposes for which rates were made

(1) [1901] 1 K. B. 617. (2) [1914] 2 K. B. 603 ; [1915] A. C. 674.

C. A. 1915

ASSOCIATED NEWSPAPERS LIMITED v. CITY OF LONDON CORPORATION.

Phillimore L.J.

when the exemption was created, was substantially a new assessment, and that it was not within the exemption in s. 51 of 7 Geo. 3, c. 37. We follow that decision by saying that the part of the general rate which represents the old consolidated rate is a substantially new assessment, and the appellants are therefore not exempt in respect thereof. This covers the first item which is described as expenses of paving, &c., and is carried out at the figure of $5\frac{3}{16}d.$ in the pound, and it also covers the expenses under the City of London (Central Criminal Court House) Act, 1904, those expenses either being imposed upon the consolidated rate and therefore coming within the decisions in *Sion College* v. *London Corporation* (1) and *Associated Newspapers Limited* v. *London Corporation* (No. 1) (2), or being a new rate levied in addition to the consolidated rate. It is unnecessary to determine which is the more correct view. That leaves only, so far as the appeal is concerned, the small sum of $\frac{2}{16}d.$ for the other expenses of the Common Council, and I agree with the mode in which Swinfen Eady L.J. has dealt with this item. It is conceivable that if this item were analysed a minute quantity might be applicable to the expenses of sewerage and drainage, and possibly something might be applicable to the expenses of the police. As regards the latter it is not of much importance, and as regards the former it is so minute as not to be worth considering, and at any rate we have not the materials to enable us, nor do I understand that we are asked, to deal with so small a point as that. I say no more about it.

With regard to the cross-appeal as to the police rate, which would carry with it possibly, as I have said, some portion of the "other expenses of the Common Council," the first question is whether, supposing there were no exemption, it is imposed upon the appellants' property. In my opinion it is. Sect. 2 of 10 Geo. 2, c. 22, imposed the watch rate "upon all and every person and persons who do or shall inhabit, hold, occupy, or enjoy any land, house, shop, warehouse, or other tenement within their respective wards." It is conceded that, but for the exemption under s. 51 of 7 Geo. 3, c. 37, those words would include the inhabitants and occupiers of the property in question in this

(1) [1901] 1 K. B. 617. (2) [1914] 2 K. B. 603; [1915] A. C. 674.

case. Sect. 58 of the City of London Police Act, 1839, imposes the police rate "upon every person who shall inhabit, hold, occupy, possess, or enjoy any house within the several wards respectively"—words somewhat similar to those in the earlier Act, and, though they may go further, I do not draw any distinction between the words in the two Acts—"or within any precinct or place within the boundaries of such wards respectively, or adjoining thereto, and not included within the limits of the Metropolitan Police district." These words by themselves would be sufficient to cover this property, all of which I understand is within some ward. Then come certain words which are relied upon: "whether such person shall be now liable in respect of such house to be assessed to the relief of the poor, or be not liable to be assessed to the relief of the poor in respect thereof by reason of such house being situate in any precinct or extra-parochial place." It is said that these words show that the section does not include the case of persons who are not liable to be assessed to the relief of the poor and who do not occupy a house in any precinct or extra-parochial place. I regard the words as explanatory merely. They say in extenso that which was implied in the Act of George II. Any place which was a precinct or extra-parochial place at the time when the Act of 1839 was passed was a precinct or extra-parochial place at the time when the Act of George II. was passed. Precincts and extra-parochial places grew up of ancient custom largely in connection with the ecclesiastical arrangements of the country, and did not come into existence after the time of George II. As the Act of George II. imposes the rate upon every house in the ward, which would include houses in precincts or extra-parochial places as well as houses in a parish, and as those words are repeated in the Act of 1839, it was really unnecessary to insert the words to which I have referred in the latter Act; but they are, as I have said, explanatory merely and do not carry the matter further. It is said that these explanatory words by implication qualify the general words imposing the charge, but I do not think that this is the right way of construing them. Moreover, in my opinion the Act is not there considering any question of relief from the rate; it is intending to include all the places in the City, whether

C. A. 1915

ASSOCIATED NEWSPAPERS LIMITED v. CITY OF LONDON CORPORATION.

Phillimore L.J.

the houses are in parishes and therefore are liable to be assessed to the relief of the poor, or in precincts or extra-parochial places which at the time were not liable to be assessed to the relief of the poor.

That being so, I think that the rate is well imposed, and the question then arises whether it comes within the exemption in s. 51 of 7 Geo. 3, c. 37, that is to say, whether it is substantially a new rate or an old one. The guide as to what is a new rate and what is an old rate in a new guise is given by the *Sion College Case* (1), and upon the reasoning of that case, which we must follow, it seems to me that this is a new rate. The rate under 10 Geo. 2, c. 22, was to provide for night watchmen whose jurisdiction and duties were confined to their particular wards. That form of police being extremely ineffective, the City out of its cash provided a day police for the whole City, not, as I understand, confined to wards. In addition to those two forms of police there was either at common law or by reason of the custom of the City a third form of police, consisting of constables for each ward, the inhabitants being liable to serve in the office, but having the privilege to serve by deputy, as was the case with many common law offices, and having to pay their deputies in order to induce them to serve. All these three forms of police, one under statute, one under the voluntary arrangements of the City, and one under custom, are superseded, and a new body of police, most like that body which was not paid by rates but out of the City's cash, but not exactly like any of the then old bodies, is established, and a new rate over the whole City, levied no doubt by wards, but not taking the form of a ward rate, and limited to 8*d.* in the pound, has been imposed. In my opinion it is a new rate, and therefore I think that the exemption does not attach to it, and the decision of the Divisional Court upon this point allowing the exemption is wrong and should be reversed. The cross-appeal will be allowed.

BANKES L.J. I am of the same opinion. So far as the appeal is concerned it seems to me that the case is covered by *Sion*

(1) [1901] 1 K. B. 617.

College v. *London Corporation* (1), and I do not desire to add anything upon that point.

With regard to the cross-appeal, there are two questions involved. The first is whether the language of the City of London Police Act, 1839, is wide enough to impose the police rate upon the land in question. This depends upon the true construction of ss. 58, 66, and 70. I confess that I have had very considerable difficulty in coming to a satisfactory conclusion as to what the draftsman meant in using the particular form of words which he used in s. 58, but reading the Act as a whole I have come to the conclusion that it was not his intention to exempt any one, but as far as possible to bring everybody into the net. I agree that the language is wide enough to impose this police rate upon the land in question.

The second question is whether, assuming that to be so, the land is exempt by reason of the provisions of s. 51 of 7 Geo. 3, c. 37. The provisions of the Act have been under discussion in a number of cases, and in *Sion College* v. *London Corporation* (1) Sir Archibald Smith M.R., in referring to the cases of *Williams* v. *Pritchard* (2), *Perchard* v. *Heywood* (3), and *Rex* v. *London Gas Light Co.* (4), said that those cases established that "the Act only created an exemption from taxes and assessments then in existence and not from substantially new ones coming into existence at a later date." In *Rex* v. *London Gas Light Co.* (4) Bayley J. in considering this question said that in his opinion the exemption might be considered as analogous to a covenant to pay taxes which applied to old taxes or others substituted for them, but not to taxes entirely new unless there were express words to give it such extensive operation. I understand that to mean that Bayley J. was applying the same test as he would in a question of contract, that is to say, whether or not the tax or rate in question was one which was reasonably in the contemplation of the Legislature at the time when the Act was passed. If that is so, that would be a guide as to whether or not, to use the language of Sir Archibald Smith M.R., the tax or assessment was

(1) [1901] 1 K. B. 617.
(2) 4 T. R. 2.
(3) 8 T. R. 468.
(4) 8 B. & C. 54.

C. A. 1915

ASSOCIATED NEWSPAPERS LIMITED v. CITY OF LONDON CORPORATION.

Bankes L.J.

substantially a new one. Channell J. in the present case said (1) that he applied the test as to whether or not the purpose for which the tax or rate was made was an old purpose or a new purpose. That does not seem to me to be a very satisfactory test, because it is possible to express the purpose in such wide language that almost any alteration or amendment of the assessment would be covered by the language of the definition. I think it is necessary to look into the facts closely and to see whether, applying the test stated by Bayley J. in *Rex* v. *London Gas Light Co.* (2), the particular tax or assessment could have been reasonably within the contemplation of the Legislature at the time when the exemption was created in 1766. The position at that date was this. An Act, 10 Geo. 2, c. 22, had been passed for better regulating the nightly watch and bedels within the city of London. The elected constables were at that time a recognized part of what I may call the bedels of the City; they were not paid, and they acted only by virtue of such common law rights as they had or such rights as were given to them by the custom of the City. The Act recognized them as an existing body, and it did not affect their position, except that it indicated what their duties were to be in relation to the new body created by the Act, namely, the watchmen and bedels who were to be paid by means of a ward rate to be levied under the Act. That was the position of matters when the exemption was created by the Act of 1766, and it continued to exist for some years. Next we learn, partly from the preamble to the City of London Police Act, 1839, and partly from a statement in the case, that those watchmen and bedels were found to be inefficient, even when they were presided over or looked after by the constables or their deputies, and in consequence a police force quite independent either of the constables or of the watchmen grew up, if I may use the expression, and at the time when the Act of 1839 was passed there were 120 policemen regulated by the aldermen of the City, paid out of the City's cash, and that is referred to in the preamble of the Act of 1839 when it speaks of a more efficient system of police having been established instead of the nightly watch. The Act repeals 10 Geo. 2, c. 22, and provides for the establishment of the new police force.

(1) [1914] 2 K. B. at p. 832. (2) 8 B. & C. 54.

Sect. 9 seems to me to be material in this connection, because it points out that "such sufficient number of fit and able men as the said Mayor, Aldermen, and Commons in Common Council assembled shall from time to time direct shall be appointed from time to time by the said Commissioner to be a police force for the city of London and the liberties thereof; and the men so to be appointed shall be sworn in as constables for preserving the peace and preventing robberies and other felonies, and apprehending offenders against the peace; and the men sworn and to be sworn as aforesaid shall, within the said City and the liberties thereof, have all such powers, authorities, privileges, and advantages, and be liable to all such duties and responsibilities, pains and penalties, as any constable"—not the watchmen—"duly appointed now has or hereafter may have within his constablewick by virtue of the common law of this realm or of any statutes made or to be made." Therefore it seems to me that this new police force was not merely an improvement upon or a substitution for the watchmen, but that it was an entirely new force which came into existence after the abolition of the watchmen and took the place of the constables, and the new police were to exercise the common law and statutory rights and duties of constables. They were to be paid, and the Act created the rate out of which they were to be paid. Taking all these circumstances into consideration, it seems to me impossible to say that this police rate is not a substantially new rate, or to say that the state of things which came into existence under this Police Act was or could have been in the contemplation of the Legislature at the time of the passing of the Act of 1766 creating the exemption.

For these reasons I agree that the cross-appeal should be allowed.

Appeal dismissed and cross-appeal allowed.

Solicitors for appellants: *Rollit, Sons & Compston, for William E. Hart, Sheffield.*

Solicitor for respondents: *Sir Homewood Crawford.*

W. F. B.

C. A.
1915
June 3.

[IN THE COURT OF APPEAL.]

LEADER AND OTHERS *v.* DIRECTION DER DISCONTO GESELLSCHAFT.

[1914 L. 1413.]

Alien—Alien Enemy—Bank with Office in London—Licence to carry on Business—Licence subject to Conditions—Judgment Creditor issuing Execution—Staying Execution—Aliens Restriction (Consolidation) Order, 1914, *clause* 24 (1.)—*Aliens Restriction Act*, 1914 (4 *& 5 Geo. 5, c.* 12), *s.* 1, *sub-s.* 1.

The plaintiffs were a firm of English solicitors carrying on business in London with a branch office in Berlin. The defendants were a banking corporation, incorporated under German law, having their head office in Berlin with an office in London. The plaintiffs before the outbreak of war between Great Britain and Germany on August 4, 1914, had a current account at the defendants' office in Berlin.

After the outbreak of war the Secretary of State, acting under the Aliens Restriction Act, 1914, and an Order in Council, granted a licence to the defendants to carry on business in the United Kingdom subject to certain limitations and conditions the effect of which was that the permission was to extend only to the completion of transactions of a banking character entered into before the war so far as those transactions would in ordinary course have been carried out through or with the London establishment, but not to any operations for the purpose of making available assets which would ordinarily be collected by, or of discharging liabilities which would ordinarily be discharged by, establishments of the bank other than the London establishment; that all transactions carried out under the licence were to be subject to the supervision and control of a person to be appointed by the Treasury; and that any assets of the bank which might remain undistributed after the liabilities had been discharged should be deposited with the Bank of England to the order of the Treasury.

While the defendants were carrying on business under the licence the plaintiffs brought an action in England against the defendants to recover the amount due on their current account at the Berlin office and obtained judgment. The plaintiffs issued a writ of fi. fa. in execution of the judgment and the sheriff seized certain goods and chattels belonging to the defendants at the London office. The defendants applied for an order to stay proceedings under the writ of fi. fa. :—

Held, that it was inconsistent with the conditions of the licence, which were within the powers conferred upon the Secretary of State by the Aliens Restriction Act, 1914, and the Order in Council, that the plaintiffs should be allowed to take in execution of their judgment the

assets of the bank which were subject to the supervision and control of the person appointed for that purpose by the Treasury, and that therefore all proceedings under the writ of fi. fa., so far as regards those assets, should be stayed.

APPEAL from an order of Ridley J. at chambers.

The plaintiffs were British subjects carrying on business as solicitors in partnership in London, and had a branch office in Berlin. The defendants were a banking corporation incorporated under German law, having their head office in Berlin with a branch office in the city of London.

Before the outbreak of war between Great Britain and Germany on the evening of August 4, 1914, the plaintiffs had a current account at the head office of the defendant bank in Berlin, and on July 30 a sum of 427*l.* 19*s.* 2*d.* stood to the credit of their current account at the head office. The plaintiffs on that date drew a cheque for this amount on the head office which that office refused to pay.

Upon the outbreak of war the London office of the defendant bank was closed by order of the British Government and remained closed until August 10, 1914. Upon this last mentioned date a licence was issued by the Secretary of State for the Home Department under the powers conferred upon him by the Aliens Restriction Act, 1914 (1), and clause 1 of the Aliens Restriction (No. 2) Order, 1914, to the defendant bank and to two other German banks permitting them to carry on business in the United Kingdom subject to certain conditions and limitations. The above-mentioned Order was revoked by the Aliens Restriction (Consolidation) Order, 1914, made on September 9, 1914, clause 24

(1) 4 & 5 Geo. 5, c. 12, s. 1, sub-s. 1: "His Majesty may at any time when a state of war exists between His Majesty and any foreign power, or when it appears that an occasion of imminent national danger or great emergency has arisen, by Order in Council impose restrictions on aliens, and provision may be made by the Order"—then follow provisions contained in sub-clauses (*a*) to (*i*) for prohibiting or imposing restrictions on aliens landing or embarking in the United Kingdom, for the deportation of aliens, for requiring aliens to reside in certain places and to comply with conditions as to registration and other matters and provisions incidental thereto, and sub-clause (*k*) is as follows: "for any other matters which appear necessary or expedient with a view to the safety of the realm."

C. A. 1915

LEADER v. DIRECTION DER DISCONTO GESELLSCHAFT.

of which contained the same provision as was contained in clause 1 of the earlier Order. (1) On September 19, 1914, the Secretary of State revoked the licence of August 10, and issued a new licence to the defendant bank and to the two other German banks, under which those banks continued to carry on banking business here. The licence stated that in pursuance of the powers conferred by the Aliens Restriction Order in Council, made under the Aliens Restriction Act, 1914, "I hereby permit" the defendant bank and the two other German banks "to carry on business in the United Kingdom subject to the following limitations, conditions, supervision, and requirement as to the deposit of money and securities.

"1. The permission shall extend only to the completion of the transactions of a banking character entered into before the fifth day of August, 1914, so far as those transactions would, in ordinary course, have been carried out through or with the London establishments. The permission does not extend to any operations for the purpose of making available assets which would ordinarily be collected by, or of discharging liabilities which would ordinarily be discharged by, establishments of the banks other than the London establishments. No new transactions of any kind save such as may be necessary or desirable for the purpose of completion of the first-mentioned transactions shall be entered into by or on behalf of the London establishments of the banks.

"2. The business to be transacted under this permission shall be limited to such operations as may be necessary for making the realisable assets of the banks available for meeting their liabilities, and for discharging these liabilities as far as may be practicable.

(1) Clause 24 of the Aliens Restriction (Consolidation) Order, 1914: "(1.) An alien enemy shall not carry on or engage in any banking business except with the permission in writing of the Secretary of State, and to such extent and subject to such conditions and supervision as the Secretary of State may direct, and an alien enemy who is or has been carrying on or engaged in banking business shall not, except with the like permission, part with any money or securities in the bank where he is or has been carrying on or engaged in business, and shall, if so required, deposit any such money or securities in such custody as the Secretary of State may direct."

"3. All transactions carried out under this permission shall be subject to the supervision and control of a person to be appointed for the purpose by the Treasury, who shall have absolute discretion:

"(*a*) To refuse to permit any payment that may appear to him to be contrary to the interest of the nation.

"(*b*) To permit any such new transactions as are in his opinion necessary or desirable for the purpose of completion of the transactions first mentioned in paragraph 1.

"(*c*) To permit or to refuse to permit the completion of any particular transaction whatsoever.

"4. Any assets of the banks which may remain undistributed after their liabilities have, so far as possible in the circumstances, been discharged shall be deposited with the Bank of England to the order of the Treasury."

On August 10, 1914, Sir William Plender was appointed by the Treasury the controller and supervisor under paragraph 3 of the licence of that date (which paragraph was in the same terms as paragraph 3 of the licence of September 19), and since that date he had acted in the same capacity under the licence of September 19 and continued so to act.

On August 27, 1914, the writ in the present action was issued, claiming the said sum of 427*l.* 19*s.* 2*d.*, and it was served, under the provisions of s. 274 of the Companies (Consolidation) Act, 1908, upon the manager at the defendants' London office. The action was tried before Scrutton J. without a jury on November 26, 1914, when the plaintiffs recovered judgment for the amount claimed with costs, which together amounted to 477*l.* 14*s.* 10*d.* On January 26, 1915, the Lords Commissioners of the Treasury stated, in answer to the plaintiffs' application, that they were not prepared to authorize the discharge of the judgment out of the assets of the London agency of the bank. On May 14, 1915, the plaintiffs issued a writ of fi. fa., and the sheriff of the city of London seized certain goods and chattels at the defendants' London office. The defendants thereupon applied at chambers for an order that the writ of fi. fa. should be set aside or that execution thereof should be stayed. One of the plaintiffs in an affidavit in opposition to the application stated that the sheriff

C. A. 1915

LEADER v. DIRECTION DER DISCONTO GESELLSCHAFT.

under the execution had seized and was in possession of furniture and other movable effects, but not any cash assets of the bank. Ridley J. refused the application. The defendants by leave appealed. (1)

Upjohn, K.C., and *C. W. Lilley*, for the defendants. It is inconsistent with the statutory scheme under which the business of the London branch of the defendant bank is being carried on to allow the plaintiffs to take the goods and chattels at the London office in execution to satisfy their judgment. The licence to the London office to carry on business is limited to the completion of transactions of a banking character entered into before the war so far as those transactions would in ordinary course have been carried out through or with the London establishment. The transaction in respect of which the plaintiffs have recovered judgment does not come within the class of transactions covered by the licence. The purposes for which the business is allowed to be carried on are (1.) to collect what may be called the London assets; (2.) to discharge the London liabilities; and (3.) to pay

(1) According to an affidavit, made by Sir William Plender on June 1 after the above order of Ridley J. was made, the British Government, in September, 1914, through the Bank of England promulgated a scheme under which the Bank of England was under certain conditions to provide acceptors of approved pre-moratorium bills with the funds necessary to pay such bills at maturity, and not to claim repayments of amounts so provided until after the expiration of one year after the close of the war. The particulars of the scheme are set out on pp. 104—106 of the Manual of Emergency Legislation, 1914. The benefit of this scheme was extended by the Bank of England to the defendant bank, London, in respect of a large number of pre-moratorium acceptances of the defendant bank, London, falling due in London. Before extending the benefit of the scheme to the defendant bank in London, the Bank of England was furnished with a statement of the defendant bank's assets and liabilities, which statement was prepared on the basis of the licence of September 19, 1914, and excluded all reference to assets which would ordinarily be collected and liabilities which would ordinarily be discharged by any establishments of the defendant bank other than the London establishment. Sir William Plender further stated in the affidavit that acting under the directions of the Treasury he refused to permit any assets of the defendant bank in London to be obtained by the plaintiffs by means of the execution which they had issued.

any surplus assets after discharging those liabilities into the Bank of England to the order of the Treasury. The Bank of England had undertaken to provide funds to meet pre-moratorium bills, and the Bank was to be indemnified against loss by the Treasury. The object of paragraph 4 of the licence is to prevent the Treasury from suffering any loss, so far as possible, under their indemnity to the Bank of England. It would be destructive of that statutory scheme to allow execution to be levied at the London office. Seizure and sale of the furniture and fittings would render the carrying on of the business impossible, and so would seizure of money or securities, which can be taken in execution under s. 12 of the Judgments Act, 1838 (1 & 2 Vict. c. 110). Paragraph 4 of the licence earmarks the assets which remain undistributed after discharging the London liabilities for the benefit of the Treasury, and it would be inconsistent with that provision of the licence that an execution creditor should, in respect of a debt incurred with the Berlin office, take the London assets. If that were allowed all the assets of the London establishment might be swept away by creditors obtaining judgments in respect of debts due at the Berlin office. The Court has power to stay any proceeding which tends to frustrate the scheme. It will therefore stay any further proceeding with the execution at the London office.

F. D. Mackinnon, K.C., and *W. R. Warren*, for the plaintiffs. It requires a clear statutory provision to deprive a plaintiff, who holds a valid judgment against a defendant, of the right of enforcing that judgment by execution. Two instances of such a provision may be referred to. In s. 3 of the Diplomatic Privileges Act, 1708 (7 Anne, c. 12), it is provided that all writs and processes against an ambassador "shall be deemed and adjudged to be utterly null and void to all intents, constructions, and purposes whatsoever"; and by s. 211 of the Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), it is provided that where a company is being wound up "any attachment, sequestration, distress, or execution put in force against the estate or effects of the company after the commencement of the winding-up shall be void to all intents." There is no statutory provision depriving the plaintiffs of their common law right to issue execution on

C. A. 1915

LEADER v. DIRECTION DER DISCONTO GESELLSCHAFT.

their judgment. The Aliens Restriction Act, 1914, under which the Order in Council and the licence were issued, only gives power, by s. 1, sub-s. 1 (*k*), to impose restrictions on aliens, that is to say, to impose restrictions on the persons and property of aliens. Clause (*k*) of s. 1, sub-s. 1, must be read as giving power by Order in Council to deal with matters ejusdem generis with those contained in the preceding clauses. There is no indication of any intention to give power by Order in Council to deprive a British subject of his right to issue execution against the property of an alien enemy, and the licence cannot be read as having that effect. It is not suggested that the Crown has exercised its prerogative of confiscating the property of alien enemies, and therefore it cannot be said that the goods seized under the execution are the property or in the possession of the Crown. The Crown has not intervened in this case, and the question is as between the plaintiffs and the defendants. The Order in Council only purports to be made under the Act, and not by virtue of the prerogative of the Crown. Clause 24 (1.) of the Order in Council prohibits an alien enemy from parting with money or securities in the bank and makes provision for depositing money or securities in such custody as the Secretary of State may direct. That only applies to money and securities and not to furniture, and it only prohibits the voluntary act of parting with money or securities. It does not affect an involuntary parting with either money or securities, such as is involved in their seizure and sale under an execution. It does not give a privilege to an alien enemy, which a British subject has not got, of having his goods protected against execution. So long as the goods remain the property of the judgment debtors, they can be taken in execution, in whosesoever custody they may be. Therefore even if the sheriff had seized money or securities the execution would be valid. But that question does not arise because the sheriff has only taken possession of furniture at the bank. The licence cannot go beyond the Order in Council. Even if the Order protects money and securities to be deposited with the Bank of England to the order of the Treasury, it cannot protect the furniture. Nor can the Court go behind the judgment and inquire into the nature of the debt in respect of which the

judgment has been recovered. The debt is now merged in the judgment, and therefore the fact that the judgment is recovered in respect of a debt incurred at the head office of the bank in Berlin is immaterial. The conditions and limitations in the licence do not affect a judgment debt. The onus is on the defendants to show that the plaintiffs' common law right to issue execution on their judgment has been taken away, and they have failed to show that either the Act, the Order in Council, or the licence has done so. [*Giles* v. *Grover* (1) was referred to.]

Next, if the Order in Council and the licence exempt the property of the defendants from execution, they are ultra vires. The Act gives no power to impose a restriction on a British subject or to confer a privilege on an alien enemy.

No reply was called for.

SWINFEN EADY L.J. This is an appeal from an order of Ridley J. at chambers refusing to set aside a writ of fi. fa. or to stay proceedings thereunder. The application is in substance to stay proceedings under the writ so far as regards the assets of the defendant bank under the supervision and control of Sir William Plender.

The point raised is a short but important one. The facts are simple. The plaintiffs, who carry on business as solicitors in London, had an office in Berlin where they carried on a branch of their business. They had an ordinary banking account at the defendants' head office in Berlin. A few days before the commencement of the war between Great Britain and Germany they drew a cheque upon the defendants' head office for the amount of their balance at the bank, but the bank refused payment. On August 27, 1914, after the commencement of the war, the plaintiffs issued a writ in the King's Bench Division to recover the amount due to them, and served it upon the proper officer at the defendants' London branch as prescribed by s. 274 of the Companies (Consolidation) Act, 1908. The plaintiffs were perfectly entitled to sue in England, although the transaction in respect of which the action arose took place in Berlin. On November 26 the plaintiffs recovered judgment for the amount

(1) (1832) 1 Cl. & F. 72.

C. A. 1915

LEADER v. DIRECTION DER DISCONTO GESELLSCHAFT.

Swinfen Eady L.J.

claimed with costs, the total sum for which judgment was recovered being 477*l.* 11*s.* 10*d.* The plaintiffs therefore hold an undisputed judgment against the defendants for 477*l.* 14*s.* 10*d.* To enforce that judgment the plaintiffs issued a writ of fi. fa., and the sheriff has taken possession of certain goods and chattels at the defendants' London office. An application is now made to stay further proceedings under the writ of fi. fa. The plaintiffs quite rightly say that they have a valid judgment and have a common law right to issue execution upon it, and that the sheriff was bound to seize the goods and chattels within his bailiwick, unless the defendants can show that that right has been taken away or interfered with. The question is whether that right has been taken away by recent legislation.

The Aliens Restriction Act, 1914, which was passed on August 5, by s. 1, sub-s. 1, provides that His Majesty may, at any time when a state of war exists, by Order in Council impose restrictions on aliens, and provision may be made by the Order in respect of certain matters. The Order may therefore impose restrictions on aliens, and those restrictions may relate to various matters, which are set out in detail in clauses (*a*) to (*k*). Clause (*k*) authorizes provision to be made "for any other matters which appear necessary or expedient with a view to the safety of the realm." Having regard to that wide language, it is clear that the Act enables restrictions to be imposed on aliens as regards both their persons and their property. Under that Act an Order in Council was made. [The Lord Justice read clause 24, sub-clause 1, of the Order.] Therefore a licence to carry on banking business may be subject to such conditions as the Secretary of State may direct.

A licence was granted by the Secretary of State to the defendant bank and to two other German banks to carry on business here, the licence now in force being dated September 19, 1914. It states that, in pursuance of the powers conferred upon him by the Order in Council made under the statute to which I have referred, "I hereby permit" the defendants and the two other banks "to carry on banking business in the United Kingdom subject to the following limitations, conditions, supervision, and requirement as to the deposit of money and

securities." The earlier part of paragraph 1 of the licence provides for the completion of transactions of a banking character entered into before August 5, 1914, so far as those transactions would in ordinary course have been carried out through or with the London establishments. The transaction now in question does not come within that provision of the licence. It arose in respect of a banking transaction at the defendants' head office in Berlin, and it is not one which in the ordinary course would have been carried out through or with the London establishment. By paragraph 2 the business to be transacted under this permission shall be limited to such operations as may be necessary for making the realizable assets of the bank available for meeting their liabilities and for discharging those liabilities as far as may be practicable. By paragraph 3 all transactions carried out under this permission shall be subject to the supervision and control of a person to be appointed for the purpose by the Treasury. Sir William Plender has been appointed supervisor and controller, and the transactions are therefore subject to his supervision and control, and the Order gives him absolute discretion to refuse to permit any payment which may appear to him to be contrary to the interest of the nation. By paragraph 4, "Any assets of the banks which may remain undistributed after their liabilities have, so far as possible in the circumstances, been discharged shall be deposited with the Bank of England to the order of the Treasury."

The licence therefore permits the bank to carry on its business here for the purpose of closing the transactions mentioned in paragraph 1. It provides that the assets shall be applied in satisfaction of the particular liabilities specified in the licence, and that any surplus assets not required for that purpose shall be deposited with the Bank of England to the order of the Treasury. The statute enables those restrictions to be imposed on aliens and on dealings with the property of aliens. In my opinion it is inconsistent with this statutory scheme that the plaintiffs should be at liberty to seize the assets of the bank under the control of Sir William Plender to satisfy their judgment debt. The scheme provides that those assets shall be applied in a certain way, and it would be inconsistent with that scheme that they should be

C. A. 1915

LEADER v. DIRECTION DER DISCONTO GESELLSCHAFT.

Swinfen Eady L.J.

applied in payment of the plaintiffs' judgment debt. The effect therefore is to take away the right of the plaintiffs to deal with the assets of this bank in any manner not within the four corners of the statute, the Order in Council, and the licence under it.

For these reasons I am of opinion that the plaintiffs are not entitled to insist upon and to persevere with their present execution. I think that the judgment is right, and no complaint has been made as to it, nor has any complaint been made as to the issue of the writ of fi. fa. It is possible—I say no more—that there may be some assets available for seizure under that writ which would not be comprised in this licence. The judgment stands and the writ of fi. fa. will stand. The proper order to make will be "that all proceedings under the writ of fieri facias be stayed so far as regards any assets of the defendants subject to the supervision or control of Sir William Plender or any other person appointed for the purpose by the Treasury under the licence of the Home Secretary dated September 19, 1914, and that the sheriff do now withdraw from possession of the said assets accordingly."

PHILLIMORE L.J. It is impossible not to feel considerable sympathy with the judgment creditors in this case, and I venture to express the hope that any advantage that can lawfully be given to them will be given. I am glad that, while we are making the order which Swinfen Eady L.J. has mentioned, we are able to leave them in possession of some small advantages. They will have the position of judgment creditors and of execution creditors with all rights with regard to the Statute of Limitations, as to their debt bearing interest, and as to their claim upon the funds of the defendants at some future date. I do not, however, think that we can do otherwise than make the order which the Lord Justice has mentioned.

The Aliens Restriction Act, 1914, gives the Crown power in time of war to make restrictions with regard to all aliens, and the Order in Council deals in some clauses with all aliens; but clause 24 deals only with alien enemies. It is not argued that the Crown or the Secretary of State is purporting to exercise any

power other than that conferred by the statute and the Order in Council. I will therefore deal with the case upon the footing that this matter stands entirely upon the statute, the Order in Council, and the licence. It seems to me to be clear that under the statute it is in the power of the Crown to prevent alien enemies from carrying on any banking business, and if the Crown can stop them from carrying on any banking business, it can impose conditions under which they shall be permitted to do so. The Order in Council is therefore validly made under the Act, and the licence is a valid exercise of the power which is conferred by the statute and the Order in Council. That being so, the operation of the various documents is this. The assets which the bank acquires are intended to be applied, first, in satisfaction of the liabilities of the London branch of the bank in respect of those transactions which would in the ordinary course have been carried out through or with the London establishment; and subject to that, and of course to the payment of the expenses of carrying on the banking business, the assets are to be in the possession of and under the control of the Treasury, that is, in the possession or under the control of the Crown acting through the Treasury. Having regard to the terms of the documents, no execution against those assets can be allowed which will diminish the assets coming to the Treasury. I rest my judgment entirely upon paragraph 4 of the licence. There may be other conditions in the licence which assist the conclusion at which I have arrived, but to my mind paragraph 4 is of itself sufficient. That paragraph provides that "any assets of the banks which may remain undistributed after their liabilities"—that is, the liabilities as aforesaid, and this is not one of them—"have, so far as possible in the circumstances, been discharged shall be deposited with the Bank of England to the order of the Treasury." Thus the Treasury are enabled to direct the Bank of England as to the application of those assets.

Upon these grounds I think that the appeal should be allowed, and that the order which has been mentioned should be made.

BANKES L.J. I am of the same opinion. I only desire to add a few observations with regard to the argument which has been

C. A. 1915

LEADER v. DIRECTION DER DISCONTO GESELLSCHAFT.

Bankes L.J.

pressed upon us, that the order which we are making in substance deprives the plaintiffs of their common law right which they would have had but for the licence to seize these particular assets of the bank. I think that, if the actual position is considered, doubt may be thrown upon the soundness of that suggestion. The position was this. War was declared on August 4, 1914, and the London office of the defendant bank was closed by order of the British Government, and it would have remained closed but for the subsequent grant of the licence. Supposing that it had remained closed, I see no reason why the plaintiffs should assume that they would have been able either to serve a writ upon the defendants in this country, or, if they had been able to do so, that they would have found any assets available upon which to levy execution at or after the date when they obtained judgment. If the office had remained closed, I think it is fair to assume that the name of the person on the register of companies upon whom service could be effected under s. 274 of the Companies (Consolidation) Act, 1908, would have been removed. I think it is also fair to assume that, at the time when the plaintiffs recovered judgment, the bank's assets would not have been available for process of execution even if the plaintiffs had been able to serve the writ. The licence which enabled the bank to open its doors and to carry on a certain class of business enabled the plaintiffs to serve their writ, and it does not seem to me to lie in their mouths to complain of the burden of the licence if they have accepted the benefit of it. The licence enables the bank to carry on its business under certain restrictions, namely, that the assets are to be under the supervision and control of a person appointed by the Treasury, and that they are to be distributed in the discharge of certain specified liabilities, and subject to the discharge of those liabilities they are to be deposited with the Bank of England to the order of the Treasury. It seems to me to be inconsistent with the conditions upon which the bank was enabled to open its doors and to deal with those assets at all that they should be taken in execution at the instance of the plaintiffs to satisfy their judgment. I agree with what Swinfen Eady L.J. has said upon the matter. It is not true to say that the plaintiffs have been deprived of their right to issue a fi. fa. They have a perfect right

to do so. They are only prevented from seizing those particular assets which are covered by the licence. I think that the appeal should be allowed.

C. A. 1915

LEADER v. DIRECTION DER DISCONTO GESELLSCHAFT.

Appeal allowed.

Solicitors for plaintiffs: *Leader, Plunkett & Leader.*
Solicitors for defendants: *Rehder & Higgs.*

W. F. B.

[IN THE COURT OF APPEAL.]

C. A. 1915 *Feb.* 12.

MONRO *v.* BOGNOR URBAN DISTRICT COUNCIL.

Arbitration—Staying Proceedings—Arbitration Clause in Contract—Action for fraudulently inducing Plaintiff to enter into Contract—Arbitration Act, 1889 (52 & 53 *Vict. c.* 49), *s.* 4.

The plaintiff, a contractor, entered into a written contract with the defendants for the construction of certain sewerage works; the contract contained a clause that "if at any time any question, dispute or difference shall arise between the council or their engineer and the contractor upon or in relation to or in connection with the contract the matter shall be referred to and determined by the engineer . . . ." After he had done certain work under the contract the plaintiff refused to complete the work, alleging that he had been induced to enter into the contract by fraudulent misrepresentations made in the specification as to the nature of the subsoil of the ground where the work was to be done, and he brought an action to recover damages for the alleged misrepresentations and to have the contract declared void. The defendants having taken out a summons under s. 4 of the Arbitration Act, 1889, to stay the proceedings and refer the dispute to arbitration under the arbitration clause in the contract:—

Held, that the dispute was not a dispute "upon or in relation to or in connection with the contract" within the meaning of the arbitration clause, and that the defendants were not entitled to have the proceedings stayed.

APPEAL from an order of Lord Coleridge J. at chambers affirming an order of Master Archibald that all further proceedings in the action be stayed pursuant to s. 4 of the Arbitration Act, 1889.

On February 16, 1914, a contract was entered into between

C. A. 1915

MONRO v. BOGNOR URBAN COUNCIL.

the plaintiff and the defendants for the construction by the plaintiff of certain sewerage works for the defendants. The contract contained an arbitration clause which was in the following terms: "If at any time any question, dispute or difference shall arise between the council or their engineer and the contractor upon or in relation to or in connection with the contract the matter shall be referred to and determined by the engineer Mr. Edmund Herbert Stevenson, of 38, Parliament Street, Westminster, or failing him by a person to be mutually agreed upon or failing agreement to some person appointed by the president for the time being of the Institute of Civil Engineers." The specification in accordance with which the work was to be done contained the following clause: "A borehole has been sunk upon the site, and it has been ascertained that the top eighteen feet of the subsoil consists of somewhat wet very loose sand and clay and below this depth the strata is of stiff clay." The plaintiff commenced work under the contract, but after a time ceased to do any more work, alleging that he had been misled into making the contract by fraudulent misstatements in the specification. He then brought this action against the defendants, in which he sought to recover damages for fraudulent misrepresentation by the defendants whereby he was induced to enter into a contract with the defendants for sewerage and other works at Bognor, and also for an injunction to restrain the defendants from using or in any way dealing with the plaintiff's plant and materials on the defendants' premises; there were also a claim for the price of work and labour done and materials supplied as upon a quantum meruit, and a claim for a declaration that the contract was void and should be rescinded. The defendants took out a summons to stay the action and to refer it to arbitration under the arbitration clause in the contract and under s. 4 of the Arbitration Act, 1889. The Master made an order staying the action and referring it to arbitration, and upon appeal Lord Coleridge J. affirmed his decision upon the ground that the plaintiff had, in a letter written by him, elected to affirm the contract, and therefore could not sue for fraudulent misrepresentation inducing him to enter into it.

The plaintiff appealed.

Holman Gregory, K.C. (*F. Hinde* with him), for the plaintiff, after stating the facts, was stopped by the Court.

Schiller, K.C., and *A. H. Richardson*, for the defendants. The plaintiff's claim is not for something which does not arise out of the contract; he has to make out a prima facie case of fraud before he can get rid of the contract. The dispute is a dispute "upon or in relation to or in connection with" the contract within the meaning of the arbitration clause. The arbitration clause must exist so long as the contract is in existence. An arbitrator would have power to give the plaintiff damages for fraud. [They referred to *Renshaw* v. *Queen Anne Mansions Co.* (1); *Russell* v. *Russell* (2); *Davies* v. *Alliance Insurance Co.* (3)]

[BANKES L.J. referred to *Kennedy* v. *Barrow-in-Furness Corporation.* (4)]

PICKFORD L.J. I think this appeal must be allowed. A contract was entered into on February 16, 1914, between the plaintiff and the defendants for the construction of sewerage works which contained an arbitration clause which was in these terms: "If at any time any question, dispute or difference shall arise between the council or their engineer and the contractor upon or in relation to or in connection with the contract the matter shall be referred to and determined by the engineer Mr. Edmund Herbert Stevenson, of 38, Parliament Street, Westminster, or failing him by a person to be mutually agreed upon or failing agreement to some person appointed by the president for the time being of the Institute of Civil Engineers. Work under the contract shall continue during the arbitration proceedings." The plaintiff, the contractor, was of opinion that he had been misled by statements made in the specification that a borehole had been taken upon the site on which he was to build. The words of the statement are: "A borehole has been sunk upon the site, and it has been ascertained that the top eighteen feet of the subsoil consists of somewhat wet very loose sand and clay and below this depth the strata is of

(1) [1897] 1 Q. B. 662.

(2) (1880) 14 Ch. D. 471.

(3) (1904) Unreported; cited in Russell on Arbitrations (9th ed.), p. 50.

(4) (1909) Reported in Hudson on Building Contracts (4th ed.), vol. 2, p. 411.

C. A. 1915

MONRO v. BOGNOR URBAN COUNCIL.

Pickford L.J.

stiff clay." He alleged that that was a fraudulent statement, that no borehole had ever been sunk upon the site on which he was to build, and that the condition of the ground on the site where he had to work was very different from that represented to have existed in the borehole. On that ground he brings this action. The plaintiff's claim is "for damages for fraudulent misrepresentation by the defendants whereby the plaintiff was induced to enter into a contract with the defendants for sewerage and other works at Bognor and has suffered loss and for an injunction to restrain the defendants from using or in any way dealing with the plaintiff's plant and materials now on the defendants' premises." The defendants would only have a right to deal with materials and plant under the contract, and the plaintiff is asking for an injunction to prevent them from doing so. Then, "The plaintiff also claims for work and labour done, money expended, and materials supplied by the plaintiff for the defendants at their request." Then it was added afterwards by amendment, "The plaintiff also claims a declaration that the said contract is void and that it be rescinded." The defendants applied to stay that action and to refer it to arbitration under the arbitration clause. They filed an affidavit and the plaintiff answered that by another affidavit. Upon that affidavit he was cross-examined, and the Master, on cross-examination, came to the conclusion that in his opinion there was no ground for the charge of fraud. Now I do not think that that question was for the Master at all. The question was whether this action should be stayed, and this action is not, in my opinion, an action upon the contract in any sense of the word. It is an action for damages for fraudulent misrepresentation which induced the plaintiff to enter into the contract and it is also an action for an injunction to prevent the defendants from applying the clause of the contract to his plant and materials, and then, not expressed in the alternative but being really in the alternative, there is a claim for work and labour done upon a quantum meruit which he could not maintain if his contract were in existence, because he could then only sue for any instalments that might be due according to the terms of the contract. It is, therefore, in no sense an action on the

contract at all. Nor do I think that it is an action in relation to or in connection with the contract. In one sense it is an action in relation to and in connection with the contract because if there had never been any contract there would never have been any cause of action, there would never have been any representation, and there would never have been any claim for damages. But it is not in relation to or in connection with the contract, in my opinion, within the meaning of the arbitration clause. That being so, I think the action is with reference to matter wholly outside the powers of the arbitrator, and with which he could not possibly deal. It may be a very bad action; the Master thinks it is. The defendants, if they have a sufficiently strong opinion about it and if they have sufficient materials to do so, have the power to apply to stay the action or to dismiss it as being frivolous and vexatious, or on the ground that the claim discloses no cause of action, or that it is an abuse of the process of the Court. They have all those steps that they can take if they think fit. But that is not the point that we have to decide. We have to decide whether this is an action that ought to be brought within the provisions of the arbitration clause by being stayed and the dispute raised in it referred to arbitration within that clause. I do not think that it is an action which comes within the arbitration clause at all, and therefore I think there was no power to stay it, and it ought not to have been stayed. The Master proceeded, I think, on a wrong basis. He said: "I do not think this is a well founded action. I think there is no case of fraud and therefore I will stay the action and send it to arbitration"—that is to say, I will send to arbitration something that the arbitrator has no power to deal with at all. Then the learned judge dealt with it on another ground—not on the same ground as the Master at all, but upon this ground, that the plaintiff could not maintain this action because he had, by a letter of June 24, elected to affirm the contract, and therefore he could not sue for damages for fraudulent representation which induced him to enter into it, and still less could he sue for rescission. That seems to me to be a matter which, if it be correct, is a matter to be decided in the action. It may show that the action cannot be maintained. It

C. A. 1915

MONRO v. BOGNOR URBAN COUNCIL.

Pickford L.J.

does not show that the action is one which comes within the terms of the arbitration clause. I think the learned judge was wrong and that his decision should be set aside. I do not know that any of the authorities are exactly on all fours with this case, but the case to which Bankes L.J. referred, of *Kennedy* v. *Barrow-in-Furness Corporation* (1), seems to me very much in point and to be in principle the same as this case.

I think the appeal should be allowed.

BANKES L.J. I quite agree. It seems to me that a person who takes out a summons such as this to stay proceedings on the ground that the question raised therein ought to be referred to arbitration has, as the first step, to establish that the question is one which is within the scope of the submission; and that is the real question for decision. We must first of all see what the matter in question in the legal proceedings is, and then consider whether it is within the scope of the submission. Now here the plaintiff has brought an action, and he has indorsed his claim upon the writ. The defendants elect, without waiting for the statement of claim (which I think they might well have done), to take out a summons at once to stay that claim as set out upon that writ. I do not think the plaintiff ought to be in a better position because he has amended the writ, though I do not think that the amendment alters the character of the claim. It is a claim for damages for fraudulent misrepresentation whereby the plaintiff was induced to enter into the contract, and there are claims for consequent relief. These are put in the form of a claim for work and labour done, but the essence of the claim is that the plaintiff is asserting that he was induced by fraud to enter into the contract, and that as a consequence the contract never was binding. If that is the nature of the claim, it seems to me plain that it does not come within the scope of the submission, and it is no answer to say that the plaintiff has mistaken his remedy and that he ought not to have brought this form of claim, and that he cannot substantiate it, or that if you look into it you will find that he ought to have brought a different action altogether, and if he had it would have been plain that it

(1) Reported in Hudson on Building Contracts (4th ed.), vol. 2, p. 411.

came within the submission. It is no use saying that, as it seems to me. The only point is whether the claim which is brought—whether it is good, bad, or indifferent—comes within the submission to arbitration. I am not saying it by way of encouragement, but it may be there are grounds upon which the defendants could satisfy the proper tribunal that the plaintiff's claim was frivolous and vexatious. They may be able to do so upon the ground which seems to have induced the Master to take the action he did, or they may do it on the ground which seems to have induced the learned judge to take the view he did. As I said before, I am not saying it by way of encouragement, but those considerations which seem to have affected the Master and the learned judge are material, and material only, as it seems to me, if the question they had to consider was whether the case made was a frivolous and vexatious one and ought to have had no weight at all upon the question of what the plaintiff's claim in fact was. One can only find out what his claim is by looking at the writ, if the matter has not gone beyond the writ, or his statement of claim, if it has arrived at that stage. I think that the decision of the Master and the decision of the learned judge were founded upon a misapprehension of the real question which had to be decided, and however inconvenient it may be to the defendants, who naturally desire that any dispute shall be settled by arbitration, it seems to me that our only course is to allow this appeal and to say that the plaintiff's present claim is not within the scope of the submission.

Appeal allowed.

Solicitors for appellant: *Walters & Co.*

Solicitors for respondents: *Haslam & Sanders, for Joseph Jubb, Bognor.*

W. J. B

C. A.
1915
Feb. 19;
May 14.

[IN THE COURT OF APPEAL.]

SAVILL *v.* DALTON.

[1913 M. 2878.]

County Court—Bankruptcy—Order for Payment of Money—Whether Action maintainable upon Order—County Court Rules, 1903, *Order* XXV., *r.* 2—*Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *ss.* 100, 168—*Bankruptcy Rules*, 1886, *r.* 93.

An action is maintainable upon an order for the payment of money made by a county court in the exercise of its bankruptcy jurisdiction.

So *held* by Lord Reading C.J. and Swinfen Eady L.J., Bray J. dissenting.

Appeal from the judgment of Horridge J. at the trial of the action without a jury.

On March 7, 1913, a married woman, carrying on a trade at Reading, executed a deed of assignment of her property to the defendant as trustee for the benefit of her creditors. A bankruptcy petition, founded on that act of bankruptcy under s. 4, sub-s. 1 (*a*), of the Bankruptcy Act, 1883, was presented against her in the Reading County Court, and on May 8, 1913, a receiving order was made and on the same day she was adjudicated bankrupt. The official receiver was trustee in the bankruptcy.

On July 17, 1913, on the application of the official receiver, an order was made by the county court judge in bankruptcy that the official receiver, having elected to treat the defendant as a trespasser, was entitled to all the stock-in-trade, trade fixtures, fittings, book debts, and other property and estate of the bankrupt which were received or held by the defendant under or by virtue of the said deed of assignment; that the defendant should deliver to the official receiver all the property received by him as aforesaid (other than the property already delivered by him to the official receiver); that an inquiry be held by the registrar as to the value of the bankrupt's property received by the defendant as aforesaid (other than the property already delivered by him to the official receiver), and as to the amount of the said

book debts collected by him; and that the defendant should pay within fourteen days from the date of the report of the registrar to the official receiver the amount which might be found to be the value of the said property and the amount of the said book debts, the defendant to pay the costs of and incidental to the motion and inquiry.

On July 29, 1913, the registrar held an inquiry (at which the defendant did not appear and was not represented), and on August 7, 1913, he made his report that, after giving credit for moneys paid to the official receiver, there was due from the defendant the sum of 291*l.* 2*s.* 1*d.*, which sum included 112*l.* 10*s.* for "depreciation of outstanding book debts." On August 11 the report was presented to the county court judge, who, upon the application of the defendant, ordered the registrar to hold a fresh inquiry. On August 26 the registrar accordingly held a fresh inquiry, but the defendant neither appeared nor was represented, and the registrar confirmed his former report. On October 30, 1913, the registrar presented his further report, which was considered by the judge, who ordered the defendant to pay the costs of the further inquiry.

This action was brought in the King's Bench Division to recover the 291*l.* 2*s.* 1*d.* found to be due under the order of July 17, 1913. (1) Horridge J. gave judgment for the plaintiff. The defendant appealed.

F. Newbolt, K.C., and *Tindale Davis*, for the defendant. The Court has no jurisdiction to entertain this action. An action will not lie upon an order of a county court. It has been held that under Order XLII., r. 24, of the Rules of the Supreme Court, 1883, which makes an order of the High Court enforceable as a judgment, an action will lie upon an order of the High Court: *Godfrey* v. *George* (2); *Pritchett* v. *English and Colonial Syndicate.* (3)

In *Furber* v. *Taylor* (4) it was held that an action was not

(1) The action was brought by Cecil Mercer, the official receiver, who died before the trial, and the present plaintiff, who succeeded him as official receiver, was substituted as plaintiff.

(2) [1896] 1 Q. B. 48.

(3) [1899] 2 Q. B. 428.

(4) [1900] 2 Q. B. 719.

C. A. 1915

SAVILL v. DALTON.

maintainable upon an order of the county court made in the exercise of its ordinary jurisdiction. Since the decision in that case Order xxv., r. 2, of the County Court Rules, 1903, has been framed in terms similar to those contained in Order xlii., r. 24, of the Rules of the Supreme Court, and it provides that "every order of the Court in any action or matter may be enforced against all persons bound thereby in the same manner as a judgment to the same effect." This rule places county court orders on the same footing as county court judgments. It does not give a higher effect to county court judgments than they had before. No action will lie upon a county court judgment: *Berkeley* v. *Elderkin* (1); *Austin* v. *Mills*. (2) Those cases proceeded upon the ground that the intention of the Legislature was to confine the remedies on a county court judgment to those specifically provided by the County Courts Act, 1846, the Act in force at that date. Therefore no action will lie upon a judgment or order of a county court in the exercise of its ordinary jurisdiction. A county court judge has ample means of enforcing his own judgments and orders. Sect. 67 of the County Courts Act, 1888, gives him all the powers of the High Court in certain matters. Sect. 93 makes every judgment and order, with certain exceptions, final. By s. 124 no judgment or order of any judge is to be removed into any other Court, except as provided by the Act. Sect. 146 and following sections deal with execution; s. 151 provides for the removal of a judgment for an amount exceeding 20*l.* into the High Court in a case where the judgment debtor has no goods which can be conveniently taken to satisfy the judgment, and concludes by saying that "no action shall be brought upon such judgment." These last words were inserted for the purpose of making it clear that no action should be brought upon a judgment when removed into the High Court. Sect. 63 contains a corresponding provision that "no action shall be brought in the Court on any judgment of the High Court."

The fact that the county court judge in the present case was exercising bankruptcy jurisdiction does not make his order a High Court order. The county court exercising bankruptcy

(1) (1853) 1 E. & B. 805. (2) (1853) 9 Ex. 288.

jurisdiction does not become part of the High Court. The official receiver might under s. 57, sub-s. 2, of the Bankruptcy Act, 1883, have brought an action to recover the money, when he might have obtained a final judgment. Instead of doing that he proceeded by way of motion in bankruptcy. He chose his own forum. Sect. 102 defines the general powers of a Court having bankruptcy jurisdiction. Sect. 100 gives a county court, for the purposes of its bankruptcy jurisdiction, all the powers and jurisdiction of the High Court: see *Skinner* v. *Northallerton County Court Judge* (1); *In re Pickard* (2); but it does not make the judge a High Court judge. For instance, by s. 2 of the Bankruptcy Appeals (County Courts) Act, 1884 (47 & 48 Vict. c. 9) (now s. 108, sub-s. 2, of the Bankruptcy Act, 1914 (4 & 5 Geo. 5, c. 59)), appeals from county courts exercising bankruptcy jurisdiction lie to a Divisional Court of which the judge to whom bankruptcy business is assigned shall be a member, whereas an appeal from an order made by the High Court in bankruptcy lies to the Court of Appeal. By r. 93 of the Bankruptcy Rules, 1886 (now r. 91 of the Bankruptcy Rules, 1915), "every order of the Court may be enforced as if it were a judgment of the Court to the same effect." An order in bankruptcy was not, within the meaning of s. 4, sub-s. 1 (*g*), of the Bankruptcy Act, 1883, a "final judgment" so as to found a bankruptcy notice upon it: *In re a Bankruptcy Notice.* (3) Now by s. 1, sub-s. 1 (*g*), of the Bankruptcy Act, 1914—which embodies the amendment first made by s. 16, sub-s. 1, of the Bankruptcy and Deeds of Arrangement Act, 1913 (3 & 4 Geo. 5, c. 34)—a final order is placed on the same footing, so far as a bankruptcy notice is concerned, as a final judgment. The result is that an order of the county court, whether in bankruptcy or not, can be enforced in the same manner as a judgment of the county court can be enforced, that is to say, by execution, but not by bringing an action upon it. Sect. 151 of the County Courts Act, 1888, is explicit to that effect. In *Furber* v. *Taylor* (4) the Court did not consider what would have been the effect of a rule similar to

(1) [1898] 2 Q. B. 680; [1909] A. C. 439.
(2) [1912] 1 K. B. 397.
(3) [1895] 1 Q. B. 609.
(4) [1900] 2 Q. B. 719.

C. A. 1915

SAVILL v. DALTON.

Order XLII., r. 24, of the Rules of the Supreme Court, if such a rule had been in existence. It was sufficient in that case to say that there was no such rule in the County Court Rules. The Court, therefore, has no jurisdiction to entertain the action, and the question of jurisdiction can be taken at any time; it may be taken on the appeal though it has not been taken at the trial: *Norwich Corporation* v. *Norwich Electric Tramways Co.* (1) The plaintiff is therefore not entitled to recover.

F. Mellor, for the plaintiff. An action is maintainable upon an order of a county court. Having regard to the fact that Order XXV., r. 2, of the County Court Rules, 1903, has been framed in almost precisely the same terms as Order XLII., r. 24, of the Rules of the Supreme Court, 1883, the Court ought to construe the county court rule in the same manner as the High Court rule has been construed. "Enforced" includes enforced by action, and therefore an action can be brought upon an order of the High Court: *Norton* v. *Gregory* (2); *Godfrey* v. *George* (3); *Pritchett* v. *English and Colonial Syndicate* (4); *Seldon* v. *Wilde.* (5) *Furber* v. *Taylor* (6) is the only case in which it has been held that an action is not maintainable upon a county court order. At the date of that decision r. 2 of Order XXV. of the County Court Rules, 1903, was not in existence, and A. L. Smith L.J. bases his reasoning upon the fact that "there is no enactment or county court rule which has with regard to orders of a county court an effect similar to that which Order XLII., r. 24, has with regard to orders of the High Court." At that time s. 146 of the County Courts Act, 1888, and Order XXV., r. 1, prescribed the mode of enforcing county court orders. In 1903 r. 2 of Order XXV. of the County Court Rules, 1903, was made, and it provided an additional mode of enforcing an order of the county court. It was framed in order to correct the decision in *Furber* v. *Taylor.* (6) It assimilates the procedure in the county court to that in the High Court. The reasoning in *Berkeley* v. *Elderkin* (7) is no

(1) [1906] 2 K. B. 119.
(2) (1895) 73 L. T. 10.
(3) [1896] 1 Q. B. 48.
(4) [1899] 2 Q. B. 428.
(5) [1910] 2 K. B. 9; [1911] 1 K. B. 701.
(6) [1900] 2 Q. B. 719.
(7) 1 E. & B. 805.

longer applicable. Sect. 151 of the County Courts Act, 1888, does not apply, because the plaintiff is not suing on a judgment. It only applies where a judgment of a county court is removed by certiorari into the High Court.

However, it is not necessary to consider whether an action is maintainable on an order of a county court when exercising its ordinary jurisdiction. In the present case the order was made by the county court in the exercise of its bankruptcy jurisdiction. A county court exercising bankruptcy jurisdiction has all the powers of the High Court, and its orders "may be enforced accordingly in manner prescribed": Bankruptcy Act, 1883, s. 100 (now Bankruptcy Act, 1914, s. 103); and s. 168 of the Act of 1883 defines "the Court" as "the Court having jurisdiction in bankruptcy under this Act." By r. 93 of the Bankruptcy Rules, 1886, "Every order of the Court may be enforced as if it were a judgment of the Court to the same effect." A county court judge is placed for this purpose in the position of a High Court judge, and an order of a county court in bankruptcy can be enforced with all the powers which the High Court possesses of enforcing its orders, and certiorari does not lie in such a case: *Skinner* v. *Northallerton County Court Judge* (1); *In re Pickard.* (2) The order therefore can be enforced by action, and the judgment of the learned judge was right. [*Ex parte Chinery* (3) and *In re Boyd, Ex parte McDermott* (4) were also referred to.]

F. Newbolt, K.C., in reply, referred to *Ex parte Reynolds.* (5)(6)

Cur. adv. vult.

May 14. LORD READING C.J. read the following judgment:— The plaintiff, the official receiver and trustee of the estate of a

(1) [1898] 2 Q. B. 680; [1899] A. C. 439.

(2) [1912] 1 K. B. 397.

(3) (1884) 12 Q. B. D. 342.

(4) [1895] 1 Q. B. 611.

(5) (1885) 15 Q. B. D. 169.

(6) A further point was raised that at any rate the plaintiffs were not entitled to recover the 112*l.* 10*s.* for "depreciation of outstanding book debts," as this item was not included in the order of the county court judge of July 17, 1913. This point is referred to in the judgments, and it is not considered necessary further to notice it here.

C. A. 1915

SAVILL v. DALTON.

Lord Reading C.J.

bankrupt, brought this action in the High Court upon an order made by the judge of the county court at Reading in the exercise of the jurisdiction in bankruptcy conferred upon the county court by the Bankruptcy Act, 1883.

On July 17, 1913, the county court judge made an order for inquiry by the registrar as to the value of the bankrupt's property received by the defendant, as to the amount of the book debts collected by him, and for payment by the defendant to the official receiver of the amount found due upon the inquiry. The registrar held the inquiry and reported that a sum of 291*l.* 2*s.* 1*d.* was due after giving credit to the defendant for the amount paid by him. The sum of 291*l.* 2*s.* 1*d.* included 112*l.* 10*s.* reported by the registrar to be due by the defendant for depreciation of outstanding book debts. At the hearing of the action judgment was given for the amount claimed, 291*l.* 2*s.* 1*d.*

The defendant's appeal has been argued upon two grounds — namely, (1.) that no action is maintainable upon an order of the county court; (2.) that the order was bad on the face of it as to 112*l.* 10*s.*, inasmuch as the registrar had no jurisdiction to report on the depreciation of the book debts.

The first point depends upon the interpretation of the language of s. 100 of the Bankruptcy Act, 1883. There is no doubt that, apart from orders made by the county court judge in the exercise of bankruptcy jurisdiction, no action could be brought upon an order made by the judge in the county court. Before the Bankruptcy and Deeds of Arrangement Act, 1913 (3 & 4 Geo. 5, c. 34), s. 16, sub-s. 1 (now embodied in the Bankruptcy Act, 1914 (4 & 5 Geo. 5, c. 59), s. 1, sub-s. 1 (*g*)), a notice in bankruptcy could not be issued upon the order of the county court judge inasmuch as that order, even though final, was not a final judgment. In order to enforce the order of the county court judge the official receiver brought this action in the High Court to recover a final judgment for the sum found due by the defendant. On behalf of the defendant it is contended that no action can be brought upon the order. The cases of *Berkeley* v. *Elderkin* (1) and *Austin* v. *Mills* (2) decided that an action would not lie upon a judgment of the county court. In the later

(1) 1 E. & B. 805. (2) 9 Ex. 288.

case of *Furber* v. *Taylor* (1) the Court of Appeal decided that an action would not lie upon an order of the county court. As was observed in that case, it was clear law prior to the Judicature Acts and the making of Order XLII., r. 24, of the Rules of the Supreme Court that an action would not lie upon an order of a Superior Court as distinguished from a judgment; but that by virtue of Order XLII., r. 24, an action could be brought upon an order of a Superior Court, as this rule provides that every order of the Court may be enforced in the same manner as a judgment to the same effect: see *Godfrey* v. *George* (2) and *Pritchett* v. *English and Colonial Syndicate.* (3) The decision in *Furber* v. *Taylor* (1) was that, as there was no such rule in the county court, the action would still not lie on the order of a county court. Subsequently in 1903 a new county court rule, Order XXV., r. 2, was passed, and it was contended that the effect of this rule is the same as that of Order XLII., r. 24, of the Rules of the Supreme Court, and that consequently an action can now be brought upon the order of the county court judge. I cannot agree with this contention. The difference is that before the making of Order XLII., r. 24, an action could be brought upon a judgment of the High Court, and by Order XLII., r. 24, it can now be brought upon an order of the High Court. But the law that an action cannot be brought upon a judgment of the county court (*Berkeley* v. *Elderkin* (4)) has not been altered. It is still the law, and the effect of Order XXV., r. 2, of the County Court Rules, 1903, is only to make an order enforceable as a judgment. As the authorities stand, apart from an order made in bankruptcy, no action will lie upon either an order or a judgment made in the county court.

That conclusion does not, however, decide this case, as the order under consideration is an order made in bankruptcy. By s. 100 of the Bankruptcy Act, 1883, "A county court shall, for the purposes of its bankruptcy jurisdiction, in addition to the ordinary powers of the Court, have all the powers and jurisdiction of the High Court, and the orders of the Court may be enforced accordingly in manner prescribed." This section confers

(1) [1900] 2 Q. B. 719.
(2) [1896] 1 Q. B. 48.
(3) [1899] 2 Q. B. 428.
(4) 1 E. & B. 805.

C. A. 1915

SAVILL v. DALTON.

Lord Reading C.J.

upon the county court judge, when sitting in bankruptcy, not only all the ordinary powers of the county court, but also all the powers and the jurisdiction of the High Court. The section makes the county court for this purpose a branch of the High Court sitting for the convenience of the public in a county court. The county court judge, when sitting in bankruptcy, is not limited to the exercise of the powers given to the county court judge in ordinary matters within his jurisdiction, but is invested for this purpose with all the powers of a High Court judge. I think this is the natural and ordinary meaning of the words of the section. In any event I read the judgment of the House of Lords in *Skinner* v. *Northallerton County Court Judge* (1) as a decision to this effect. Lord Halsbury (at p. 441) says: "In respect of bankruptcy the statute has given all the powers and jurisdiction which the High Court possesses to a county court sitting in bankruptcy . . . . the statute itself has made the county court the High Court for this purpose." In *In re Pickard* (2) Phillimore J., when considering the extent of the powers and jurisdiction of the judge of the county court sitting in bankruptcy to commit for contempt, was of opinion that the county court judge had the same power to enforce obedience to orders made by him in the bankruptcy jurisdiction of his Court as a judge of the High Court. The order made could not be supported under the County Court Rules, but Phillimore J. nevertheless upheld the validity of the order on the ground that it complied with the Bankruptcy Rules regulating the mode in which the power of the High Court to commit should be exercised, and that the county court judge had all the powers of the High Court for this purpose.

By r. 93 of the Bankruptcy Rules, 1886, every order of the Court may be enforced as if it were a judgment to the same effect. "The Court" means the Court having jurisdiction in bankruptcy (s. 168 of the Act of 1883). The object of this rule was to make all orders made by the Court in bankruptcy as enforceable as judgments. The words of s. 100, "and the orders of the Court may be enforced accordingly in manner prescribed," mean that the order of the Court, notwithstanding that it is an

(1) [1899] A. C. 439. (2) [1912] 1 K. B. 397.

order of the county court, shall be equivalent for the purpose of enforcement to an order of the High Court. By the statute the county court in bankruptcy can make orders as if it were the High Court, and when made these orders are to be enforceable to the same extent as orders of the High Court. In my view the Legislature, when conferring upon the county court for the purpose of bankruptcy jurisdiction all the powers and jurisdiction of the High Court, meant also to give to orders of the county court the same degree of enforceability as appertains to orders of the High Court. The result, in my opinion, is that, as an action can be brought to enforce an order of the High Court, an action can be brought to enforce an order of the county court made in bankruptcy, and the first point taken by the defendant therefore fails.

I do not feel pressed by the practical difficulties which it is suggested may follow from this interpretation of the statute. The county court will continue to enforce its orders made in bankruptcy as they have heretofore been enforced. When necessary it can in addition enforce them as if it was the High Court enforcing a High Court order. The amount of the judgment must, however, be reduced by the sum of 112*l.* 10*s.* This sum represents the amount which the registrar found due as damages for depreciation of book debts which should have been collected by the defendant. The order of July 17, 1913, did not provide for any such inquiry or payment of any such amount. That order was limited to an inquiry by the registrar as to the value of the bankrupt's property received by the defendant and of the book debts collected by him, and to payment of the amount found due upon such inquiry. It was no part of the order that an inquiry should be made as to depreciation of the outstanding book debts which the defendant had failed to collect, or that payment should be made of any amount found due in respect of such depreciation. The result is that the registrar's report as to 112*l.* 10*s.* on the face of it travels beyond the order made by the county court judge for inquiry and payment, and cannot be supported. The judgment must be varied by reducing the amount from 291*l.* 2*s.* 1*d.* to 178*l.* 12*s.* 1*d.*, and to that extent the appeal must be allowed. As neither party has succeeded

C. A. 1915

SAVILL v. DALTON.

except in part there will be no order as to the costs of the appeal.

SWINFEN EADY L.J. read the following judgment:—The first question which arises upon this appeal is whether an action may be brought upon an order of a county court judge made in the exercise of his bankruptcy jurisdiction. It was conceded in argument, and indeed cannot be disputed, that, if an order be made by a registrar or judge of the High Court in the exercise of bankruptcy jurisdiction, an action may be brought upon the order in the same manner as it may be brought upon an order of the High Court made in exercise of its ordinary jurisdiction; as to which see *In re Boyd, Ex parte McDermott* (1), where it was held by the Court of Appeal that a judgment obtained upon an interlocutory order for costs made in an action in the Queen's Bench Division is a final judgment for the purpose of founding upon it bankruptcy proceedings.

An order of the High Court is not a judgment, but under Order XLII., r. 24, every order of the Court may be enforced in the same manner as a judgment. By the Bankruptcy Act, 1883, s. 100, "A county court shall, for the purposes of its bankruptcy jurisdiction, in addition to the ordinary powers of the Court, have all the powers and jurisdiction of the High Court, and the orders of the Court may be enforced accordingly in manner prescribed." In my opinion the effect of this section is to make the orders of a county court in bankruptcy enforceable as the orders of a Court having all the powers and jurisdiction both of the High Court and of the county court, otherwise the orders would not be enforceable "accordingly," but only as orders made in the exercise of the ordinary jurisdiction of the county court. It is also to be borne in mind that the orders are to be enforced "in manner prescribed," and the rules prescribe (r. 91) that it shall be the duty of the high bailiff of a county court to execute warrants and other process, and in the case of the High Court such officers or officer as the Court may direct. By r. 93 of the Bankruptcy Rules, 1886, every order of "the Court"—i.e., by s. 168, sub-s. 1, of the Act of 1883, of "the Court having

(1) [1895] 1 Q. B. 611.

jurisdiction in bankruptcy" under the Bankruptcy Act—may be enforced as if it were a judgment of the Court to the same effect.

As the county court has the same jurisdiction as the High Court for the purposes of bankruptcy, I see no ground for drawing any distinction between the force and effect or mode of enforcement of the orders made by them respectively, except so far as a different manner is or may be prescribed.

The case of *In re Pickard* (1) shows that the orders made by a county court judge exercising bankruptcy jurisdiction may be enforced in a manner not within the ordinary County Court Rules. Again, in *Skinner* v. *Northallerton County Court Judge* (2) both the Court of Appeal and the House of Lords pointed out that the Bankruptcy Act has made the county court the High Court for the purpose of bankruptcy jurisdiction, and a proceeding before it is to be treated as equivalent to, and as if it were, a proceeding before the High Court. By the Bankruptcy Act, 1914, s. 1, sub-s. 1 (*g*), passed since this action has been pending, a bankruptcy notice may now be founded upon a final order as well as a final judgment, so it will in future no longer be necessary to bring an action upon a final order with a view to instituting proceedings in bankruptcy.

In my judgment the present action is maintainable.

The second question raised by the appeal has reference to the amount for which judgment was given. On July 17, 1913, an order was made by the county court judge, in the exercise of his bankruptcy jurisdiction, that Sydney Dalton, the defendant herein, do pay to the official receiver the value of certain property of the bankrupt received by him, and the amount of book debts of the bankrupt collected by him, and by the same order an inquiry was directed to be made by one of the registrars of the Court as to the value of the bankrupt's property received by the said Sydney Dalton, and as to the amount of the said book debts collected by him. By the same order Sydney Dalton was ordered to pay to the official receiver within fourteen days after the date of the registrar's report the amount thereby found to be the value of the said property and the amount of the said book debts. By a report dated August 7, 1913, the registrar found

(1) [1912] 1 K. B. 397. (2) [1898] 2 Q. B. 680; [1899] A. C. 439.

C. A. 1915

SAVILL v. DALTON.

Swinfen Eady L.J.

that there was due upon the footing of the said inquiry from Sydney Dalton to the official receiver the balance or sum of 291*l.* 2*s.* 1*d.* This balance, however, includes a sum of 112*l.* 10*s.*, about which the question arises. An application was made by Sydney Dalton to the judge on August 11 that the matter might be further considered by the registrar, but as on the further appointment before the registrar Sydney Dalton did not appear, and the registrar on August 26 merely confirmed his previous report, nothing now turns upon this incident.

The present action is by the official receiver and trustee to recover the said sum of 291*l.* 2*s.* 1*d.* found due by the report. In my opinion the judgment is erroneous as to 112*l.* 10*s.*, part of the said sum of 291*l.* 2*s.* 1*d.* The sum of 112*l.* 10*s.* is not any part of the amount which by the order of July 17, 1913, the defendant was ordered to pay. It does not represent any property of the bankrupt received by him, or any book debts collected by him, beyond which the order to pay did not extend, but some alleged depreciation of book debts, not within the order of July 17, 1913, and not forming any part of the matter referred for inquiry to the registrar, and for which, so far as I can gather the defendant is under no liability whatever. At all events, it is sufficient to say that it is not within the terms of the order, upon which alone the judgment is founded.

The judgment under appeal must be varied by reducing the amount of it to 178*l.* 12*s.* 1*d.*, that is, by allowing the appeal to the extent of 112*l.* 10*s.* As each party has partly succeeded and partly failed, there should be no order as to the costs of the appeal.

BRAY J. read the following judgment:—The questions for our decision are two: First, whether an action can be brought on an order of a county court judge exercising his bankruptcy jurisdiction. Second, whether the order of the county court on which the action was founded was bad on its face, and how far that constitutes a good defence.

The first question is one of considerable importance, and may be divided into two: Can an action be brought on an order or judgment of a county court judge exercising his ordinary juris-

diction? If not, can an action be brought when the order is one made by the judge when exercising his bankruptcy jurisdiction? As long ago as 1853 there were two decisions, one of the Court of Queen's Bench consisting of four judges, and one of the Court of Exchequer following it, that no action could be brought on a county court judgment. The main ground of the decision was this, that the Act of 9 & 10 Vict. c. 95 created a new Court, and where new rights are given with specific remedies the remedy is confined to those specifically given: *Berkeley* v. *Elderkin* (1); *Austin* v. *Mills*. (2) Since then there have been two further County Courts Acts, the Act of 1856 (19 & 20 Vict. c. 108) and the Act of 1888 (51 & 52 Vict. c. 43), but except by s. 49 of the Act of 1856 and s. 151 of the Act of 1888 there is no provision dealing with the matter. Sect. 49 of the Act of 1856 and s. 151 of the Act of 1888, which are in the same terms, provide for the removal by certiorari of a county court judgment into the High Court when the amount exceeds 20*l.* and there are no goods of the debtor on which execution can be levied. At the end of each section are the words "but no action shall be brought upon such judgment."

I think Mr. Newbolt was right in his suggestion as to why the words were inserted. It was well known that no actions could be brought on county court judgments, and the words were inserted to make it clear that the section did not give any such right when the case had been removed by certiorari into the High Court.

In *Furber* v. *Taylor* (3) it was decided that no action could be brought on an order of the county court, but it was pointed out by the Court that there was no rule in the county court corresponding with Order XLII., r. 24, in the High Court. In 1903 a new rule was made—see Order XXV., r. 2, of the County Court Rules, 1903—to the same effect as Order XLII., r. 24, and it was argued that the effect of the new rule was the same as that of Order XLII., r. 24, namely, to allow an action to be brought on an order of the county court. The answer to that is that Order XLII., r. 24, enabled an action to be brought on an order of the High

(1) 1 E. & B. 805. (2) 9 Ex. 288.

(3) [1900] 2 Q. B. 719.

C. A. 1915

SAVILL v. DALTON.

Bray J.

Court, because it provided: "Every order of the Court or a judge in any cause or matter may be enforced against all persons bound thereby in the same manner as a judgment to the same effect"; and an action always could be brought on a judgment in the High Court; but that, as no action could be brought on a judgment in the county court, Order xxv., r. 2, could not have that effect. It is impossible to suppose that it was intended that an action might be brought on a county court order, though it could not be brought on a county court judgment. The object of the rule was to extend Order xxv., r. 1, which only allowed one means of enforcing an order, namely, that of s. 146, and to allow to an order all the other means of enforcing a judgment, as, for instance, garnishee proceedings or the appointment of a receiver. In *Furber* v. *Taylor* (1) the two decisions in 1853, which I have before referred to, were cited, but nothing was said by the Court which suggested that they were not still good law. The reasons given in those decisions apply equally to the County Courts Act, 1888. There is no record of any action having been brought either on a county court judgment or on a county court order, and I have come to the clear conclusion that no such action can be brought.

If then no action can be brought on an order or judgment of the county court in its ordinary jurisdiction, can an action be brought on an order made in its bankruptcy jurisdiction? The most important section of the Bankruptcy Act, 1883, to be considered is s. 100, which is in these words: "A county court shall, for the purposes of its bankruptcy jurisdiction, in addition to the ordinary powers of the Court, have all the powers and jurisdiction of the High Court, and the orders of the Court may be enforced accordingly in manner prescribed." I will deal with the earlier part of this section presently. It is the latter part which provides for the enforcement of bankruptcy orders in the county court. "Manner prescribed" means prescribed by the rules, and it is r. 93 that prescribes the manner of enforcement. It is in these words: "Every order of the Court may be enforced as if it were a judgment of the Court to the same effect." "The Court" by s. 168 means "the Court having jurisdiction in

(1) [1900] 2 Q. B. 719.

bankruptcy under this Act." Sect. 92 provides that the Courts having jurisdiction in bankruptcy shall be the High Court and the county courts (save certain excluded county courts). Sect. 95 contains provisions as to the Court in which the petition shall be presented, namely, in certain cases it is to be presented to the High Court, and in all other cases to the county court where the debtor resides or carries on business. Sect. 97 provides for transfers from one Court to another.

It is plain from these provisions that in any particular bankruptcy one Court and one only (subject to transfer) has jurisdiction. This may be the High Court or any one of the county courts. If there is jurisdiction in one of the county courts there is none in the High Court unless and until a transfer is made. In this bankruptcy it was the Reading County Court and no other that had jurisdiction in bankruptcy. "The Court" therefore in this case was the Reading County Court. "May be enforced" must mean may only be enforced because no other manner is prescribed. It is not one of the ways in which an order may be enforced, but the way. "As if it were a judgment of the Court to the same effect." "The Court" must bear the same meaning as before, i.e., the Reading County Court, because that is the Court having jurisdiction. It cannot mean the High Court, because that Court has no jurisdiction in the matter. As there are, so far as I am aware, no judgments in bankruptcy, "a judgment of the Court" means an ordinary judgment of the Reading County Court. If we apply r. 93, therefore, to the present case, it prescribes that the order in this case is to be enforced as if it were an ordinary judgment of the Reading County Court to the same effect. This is what one would expect. It is the Court in which the order is made that should enforce it, and this Court is to enforce it in the same way as it would enforce any order or judgment of its own to the same effect. Order xxv. of the County Court Rules contains elaborate provisions as to the various modes of enforcing county court judgments, and the effect of r. 93 is that an order in bankruptcy made by any county court may be enforced in any of the ways provided by Order xxv. of the County Court Rules. That is the "manner prescribed" referred to in s. 100 of the Bankruptcy Act, 1883.

C. A. 1915

SAVILL v. DALTON.

Bray J.

So far the answer to the question we have to decide seems to me fairly plain. Reliance, however, was placed on the word "accordingly." It is said that that means "as if it were an order of the High Court," or, "with all the powers and jurisdiction of the High Court," and therefore that the county court judge has the same powers of and jurisdiction in enforcing orders as if he were a judge of the High Court. If this be so, the section and rule together as applicable to this case would read thus: "And the order of the Reading County Court may be enforced as if it were an order of the High Court in manner prescribed, i.e., as if it were a judgment of the Reading County Court to the same effect." This seems to be an impossible construction. I think it is equally impossible to read the section as giving the county court judge the power of enforcing an order in both ways, i.e., in the same manner as a High Court order or judgment and in the same manner as a county court order or judgment. The procedure in the two Courts differs in several important particulars. The mode of execution on goods is quite different. In the High Court the solicitor of the execution creditor takes out a fi. fa. and directs the sheriff to proceed. In the county court the Court keeps control of the process and directs the high bailiff. The sheriff pays the money he receives to the execution creditor. The high bailiff pays it into Court. It is impossible that the Legislature could have intended that an order in bankruptcy could be enforced in both these ways or in either of them at the option of the execution creditor, and yet it must be so if every order is to be enforced as if it were a High Court order or judgment and also as if it were a judgment of the county court. Is the execution creditor who has obtained a bankruptcy order in the county court to be at liberty to issue a fi. fa. directed to the sheriff of any county where the judgment debtor may have goods? Is the praecipe to be entitled in the county court or the High Court? May he apply in judges' chambers to a High Court judge or Master, say, for the appointment of a receiver? What jurisdiction has a High Court judge or Master in a proceeding which is in the county court? Is the judgment creditor to be at liberty to issue a writ of elegit, and, if so, will it be a proceeding in the High

Court or the county court? The county court cannot issue a writ of elegit, and there are no rules for regulating the procedure under such a writ. Surely this cannot be. Why should a county court order in bankruptcy be enforceable both as a county court judgment and a High Court judgment, and a High Court order in bankruptcy only as a judgment in the High Court? If this had been intended, would it not have been expressly so stated in the rule, whereas the rule contemplates that the manner in which an order in bankruptcy is to be enforced depends upon the Court which has jurisdiction in the matter. In my opinion the first part of s. 100 provides for the making of orders, and gives the county court judge all the powers and jurisdiction of the High Court to make orders, and the latter part of the section deals with enforcing orders, and the word "accordingly" may be read as "according to the terms thereof," or "so as to give effect to the powers and jurisdiction so exercised"; but whatever it may mean, it cannot, I think, mean as if it were an order or judgment of the High Court; and yet, unless it is so read, no action can be brought on such an order. It is to be observed further that it is not the powers and jurisdiction of the High Court that enable an order or judgment of the High Court to be enforced by action. The judge of the High Court can neither withhold from (unless he stays execution) nor give to the judgment creditor the right to bring an action. The right arises from the supposed or implied contract between the parties that they will obey the judgment: see *Grant* v. *Easton* (1); a contract which does not exist in the case of the county court judgment, because the Legislature, when it created the county courts, chose to confine the remedies to those specifically given: see *Berkeley* v. *Elderkin.* (2)

I have, however, to deal with two authorities which were cited to us. The first case was *In re Pickard.* (3) The head-note goes, I think, too far. Phillimore J. decided the case on the ground that it was not a process by way of attachment, but a process by way of motion for contempt: see p. 402. He said, however (at p. 403): "I see no provision either in the Bankruptcy Acts or in

(1) (1883) 13 Q. B. D. 302.
(2) 1 E. & B. 805.
(3) [1912] 1 K. B. 397.

C. A. 1915

SAVILL v DALTON.

Bray J.

the Bankruptcy Rules for the exercise of the power of attachment. But even if the order may be enforced by attachment it can none the less be enforced by committal." His attention was not called to r. 93, and at most what he said was only a dictum. Rule 93 says that every order may be enforced as if it were a judgment of the county court, and attachment is one of the ways of enforcing a county court order: see Order xxv., r. 57. So that whatever may be the true construction of s. 100 of the Bankruptcy Act, I think that the Court may enforce its order by warrant of attachment, though, as the Court rightly decided, it may also punish for contempt of Court under the express power given by s. 24, sub-s. 4. Punishment for contempt of Court is not enforcement of an order. It is punishment for disobedience. Phillimore J. says later that the Court in the exercise of its ordinary jurisdiction has the power to attach. It seems to me that all that was necessary for the decision of that case and all that the learned judges really decided was that the county court judge had power to commit for contempt of Court, and that process being different from a process by attachment Order xxv., rr. 57—63, did not apply. Bucknill J. decided the case on the same ground, saying that the bankrupt had been guilty of a contempt of Court for having wilfully failed to comply with s. 24, sub-s. 4, of the Bankruptcy Act, and might be punished accordingly. In my opinion this case does not assist the plaintiff. Nor in my opinion does *Skinner* v. *Northallerton County Court Judge*. (1) That case decided that the county court judge had made the order in question under the jurisdiction given to him by the earlier part of s. 100, and consequently certiorari to quash it did not lie. No question arose as to the enforcement of an order or as to the construction of the latter part of s. 100 or r. 93, and my judgment depends upon what is the true construction of that rule which prescribes the manner in which county court orders in bankruptcy are to be enforced. I have made inquiries as to the practice with reference to the enforcement of the orders of the county court made in bankruptcy, and I understand that they are always enforced in the same way as ordinary county court judgments, and never as High Court judgments. It

(1) [1898] 2 Q. B. 680; [1899] A. C. 439.

would revolutionize the whole practice if we were to hold that they were enforceable in the same manner as High Court orders, and, as far as I can see, without any advantage. Most of the orders are for small amounts, and all the reasons given by the judges in *Berkeley* v. *Elderkin* (1) are applicable. If a High Court action could be brought on every county court order in bankruptcy it would be most oppressive on the execution debtor. The option to the execution creditor to enforce it either as a High Court order or as a county court order would be equally oppressive.

In my opinion this action fails and the appeal succeeds, and the proper order to be made would be that judgment should be entered in the action for the defendant with costs, but as the expense of the appeal has been wholly caused by the defendant not attending at the trial or raising the point there, I think he should pay the costs of this appeal. Holding this view, it becomes unnecessary for me to decide whether the plaintiff can recover the whole of the amount claimed, and I prefer not to express an opinion on this point. My doubt is whether, if this order is to be treated, contrary to the opinion I have expressed, for all purposes as a High Court judgment, the High Court can say that it is bad on the face of it or refuse to issue execution on it while it remains unreversed, and when in fact an application to set aside the findings of the registrar has failed.

Judgment varied.

Solicitors for plaintiff: *W. H. Martin & Co., for F. A. Sarjeant, Reading.*

Solicitors for defendant: *Edgar & Co.*

(1) 1 E. & B. 805.

W. F. B.

C. A.
1915
May 18;
June 8.

[IN THE COURT OF APPEAL.]

SEAL *v.* TURNER.

Practice—Costs—Shorthand Notes—Joint Note—Agreement—Costs in the Cause—Order LXV., *r.* 27.

In an action to recover money subscribed for preference shares and which the plaintiff alleged had been obtained from him by fraudulent misrepresentation, the trial lasted eight days and resulted in judgment for the defendant with costs.

On taxation the Master allowed the costs of taking and transcribing a shorthand note of the proceedings and of transcripts for the judge and counsel for the defendant. The plaintiff objected to this item and insisted that there was nothing to make these costs costs in the cause. It appeared that at the commencement of the trial both parties came to an agreement that a note should be taken and a transcript provided for the judge:—

Held, that there was an implied agreement that the costs of taking the note, transcribing it, and making a copy for the judge should be borne equally by the parties (nothing having been said about making these costs costs in the cause), and that the plaintiff was liable to pay half of these costs, but

Held, also, reversing the decision of Bailhache J., that in the absence of a direction by the judge at the trial or an agreement by the parties that the costs of the shorthand notes should be costs in the cause, such costs ought not to be allowed on taxation as part of the costs of the cause; and that except to the extent above stated no such agreement could be implied in the present case. The decision in *Hebert* v. *Royal Society of Medicine* (1911) 56 Sol. J. 107 dealt only with costs in the Court of Appeal and did not affect this question.

Dictum of A. L. Smith L.J. in *Osmond* v. *Mutual Cycle and Manufacturing Supply Co.* [1899] 2 Q. B. 488, 494, dissented from.

APPEAL from a decision of Bailhache J.

This action was brought against the defendant as chairman of the directors of the Law Guarantee Society to recover 50*l.* which the plaintiff had subscribed for preference shares and which he alleged had been obtained from him by fraudulent misrepresentation. He delivered particulars of 221 instances of transactions which he said supported his charge and followed this up with eighty-three interrogatories with the same object. The trial lasted eight days before Darling J. and a special jury and resulted in judgment for the defendant with costs.

On taxation the Master allowed the costs of taking and transcribing a shorthand note of the proceedings and copies for the judge and for three counsel for the defendant. The plaintiff objected amongst other things to this item, and insisted that there was nothing to make these costs costs in the cause. It appeared that at the commencement of the trial both parties agreed that there ought to be a shorthand note, but did not agree who was to take it. After some conversation with the learned judge it was agreed that a note should be taken and that his Lordship should be provided with a copy of the transcript. Nothing was said about making the costs of the shorthand note costs in the cause.

It was stated that some third parties had paid half the costs of taking the note. The plaintiff admitted in the Court of Appeal that he was liable to pay half the costs of the note and of transcribing it and of making the copy for the judge.

The Master overruled the plaintiff's objections on the authority of *Hebert* v. *Royal Society of Medicine* (1) and because he thought it was reasonable to take the note; and Bailhache J. supported his order.

The plaintiff appealed on this and other questions which do not call for a report.

The appeal came on for hearing immediately after an application by the plaintiff for judgment or a new trial, which their Lordships dismissed.

Thorn Drury, *K.C.*, and *C. Doughty*, for the appellant. The appellant ought not to have been ordered to pay the costs of the shorthand notes. It is settled that in the absence of an agreement to that effect between the parties there is no jurisdiction to treat such costs as costs in the cause. It is only by agreement that any part of these costs can be allowed, and the only question here is what was the agreement between the parties. It is quite clear that the most that was agreed to was that both sides should share the costs equally, without regard to the result of the action. The Master relied on *Hebert* v. *Royal Society of Medicine* (1), but that refers to costs in the Appeal Court, not to costs in a Court of first instance. The rule is stated in *In re Roney & Co.* (2),

(1) 56 Sol. J. 107.

(2) [1914] 2 K. B. 529.

C. A.
1915
SEAL
v.
TURNER.

Jones v. *Llanrwst Urban Council* (1), and *Osmond* v. *Mutual Cycle and Manufacturing Supply Co.* (2)

Stuart Bevan, for the respondent. The agreement that a note should be taken carried with it an implied agreement that the costs should be costs in the cause: per A. L. Smith L.J. in *Osmond* v. *Mutual Cycle and Manufacturing Supply Co.* (3) It was necessary that there should be a record of the proceedings. The expense incurred was reasonable; although it is not contended that the Master can in all cases allow the costs of shorthand notes on that ground. *Hebert* v. *Royal Society of Medicine* (4) was cited with approval in *In re Roney & Co.* (5) At all events the appellant must pay half the costs of taking the note and the transcript and the copy for the judge.

Thorn Drury, K.C., in reply, referred to *East London Ry. Co.* v. *Conservators of the River Thames.* (6)

Cur. adv. vult.

June 8. LORD COZENS-HARDY M.R. There is only one point upon which judgment was reserved, and it raises an important question as to the circumstances in which costs of shorthand writers' notes of evidence ought to be allowed on party and party taxation.

I think it is settled that the costs of shorthand notes of the evidence ought not to be allowed unless there is some agreement by the parties or some direction by the judge to the contrary. Such a direction is very usually given in patent actions. If there is nothing more than an agreement between the solicitors that there should be one shorthand writer's notes, the only implied agreement is that the costs of the shorthand writer should be borne equally between the parties. If, in addition, it is agreed that a transcript should be provided for the use of the judge, who is told, in effect, that he need not take full notes, I think that the costs of such transcript must by agreement be borne equally between the parties. If nothing more is expressly agreed, it is rash to imply any further agreement making the costs costs in

(1) [1911] 1 Ch. 393.
(2) [1899] 2 Q. B. 488.
(3) [1899] 2 Q. B. 488, 494.
(4) 56 Sol. J. 107.
(5) [1914] 2 K. B. 529.
(6) (1904) 48 Sol. J. 492.

C. A. 1915

SEAL v. TURNER.

Lord Cozens-Hardy M.R.

the action. Nothing is more easy to express than such an agreement. In the present case I think it is clear that there was no express agreement that the costs should be costs in the action. In the absence of such an agreement I think the costs of transcripts for the counsel of the successful party ought not to be allowed.

When the matter comes to the Court of Appeal somewhat different considerations arise. This Court, in dealing, not with the costs of the trial, but with the costs in the Court of Appeal, can say, and very frequently does say, that the whole, or parts, of the shorthand writer's notes, as used in the Court of Appeal, shall be included in the costs of the appeal.

Now in the present case the taxing Master has allowed the cost of taking the notes, which is very small, and also transcripts for the judge and for three counsel, and in a trial which lasted more than seven days this amounts to a very large sum. The taxing Master has allowed this, partly in reliance upon what was said by Vaughan Williams L.J. in *Hebert* v. *Royal Society of Medicine* (1), and partly on the ground that it was reasonable. In my opinion *Hebert's Case* (1) decides nothing as to the costs of the trial, and dealt only with the costs in the Court of Appeal, and does not warrant the view taken by the taxing Master. Moreover, the judgment of Buckley L.J. in *In re Roney & Co.* (2) seems inconsistent with that view. There is no authority that such costs can be allowed as being within the discretion of the taxing Master. In my opinion the taxation on this point ought to be reviewed by allowing only one half of the costs of taking the notes and of the transcript of the evidence furnished by agreement to the learned judge at the trial.

There remains to consider whether all or any part of the costs of this evidence ought to be allowed in the costs of the appeal. This point does not strictly arise on the present application to review the taxing Master's certificate, but the parties have very reasonably agreed that we should deal with this matter now. It must be remembered that the appeal was only against one finding of the jury, and that by far the greater part of the

(1) 56 Sol. J. 107. (2) [1914] 2 K. B. at p. 540.

C. A. 1915

SEAL v. TURNER.

Lord Cozens-Hardy M.R.

evidence was not in any way relevant to the question which alone was raised by the notice of appeal. I think that the defendant is entitled to have included in the costs of the appeal nothing more than the costs of the transcript of Seal's evidence which alone was referred to before us. The taxing Master will of course take care not to allow as costs of the appeal any costs which have been paid as costs up to and including the judgment. I do not forget the summing-up, the costs of which are allowed without express mention.

The result is that the present appeal partly succeeds and partly fails, and there should be no costs to either party of the appeal.

BANKES L.J. This is an appeal from an order of the judge at chambers confirming an order of the Master overruling certain objections of the plaintiff to the taxation of a bill of costs. The items in question relate to the cost of the shorthand notes of the trial. The case was a heavy one and the trial lasted seven days. The costs as allowed by the Master amounted to some 350*l.*, and they included the charges for taking the note and for transcribing it, and for one copy for the use of the judge, and for three copies for the use of the defendant's counsel. The plaintiff carried in objections to all these items. In his answers to the objections the taxing Master gives the grounds upon which he overruled them. After setting out an extract from the shorthand note as showing what passed between counsel and the learned judge at the trial as to the taking of a shorthand note he proceeds as follows: "This in my view brings this case within the decision of the Court of Appeal in *Hebert* v. *Royal Society of Medicine* (1), upon which the taxing Masters of course act. I think it was reasonable to take and to transcribe the shorthand notes and that they shortened the trial and saved expense in the end, and on the authority of the case referred to I allow the shorthand notes, and I should do so if it were in my discretion apart from authority." I do not understand the taxing Master as suggesting that he had any discretion to allow these costs

(1) 56 Sol. J. 107.

C. A. 1915

SEAL v. TURNER.

Bankes L.J.

apart from any agreement of the parties. If he did suggest it I should not agree with him on that point. I read his answer as meaning that he decided against the plaintiff on the authority of the case cited. I cannot agree with the Master's view of that decision. It was a decision of the Court of Appeal given by Vaughan Williams L.J. and cited with approval by the same Lord Justice in the later case of *In re Roney & Co.* (1) The decision applies only to the practice of the Court of Appeal as to the allowance of the costs of shorthand notes used upon an appeal, and it is not an authority upon the point which the taxing Master had to decide. Whether the decision appealed from can be supported on other grounds depends upon what is the true construction of what passed at the trial when the question of a shorthand note was mentioned, and the real question for decision is whether what passed amounted to an agreement as to the costs of the shorthand notes, and if so what the precise agreement was. Two cases were cited to this Court as bearing on the question: *Osmond* v. *Mutual Cycle and Manufacturing Supply Co.* (2) and *In re Roney & Co.* (3) In neither case does what was said amount to more than a dictum; but if the dicta conflict I prefer the opinion of Buckley L.J. in the latter case to that of A. L. Smith L.J. in the former. In this case, as in every other involving the question of agreement, or no agreement, or the construction of an agreement, the decision must depend upon the particular facts of the case. What occurred in the present case appears in the extract from the shorthand note set out in the Master's answer: "(Darling J.) Mr. Duke, is either side having a shorthand note taken? (Mr. Duke) Yes, my Lord, I believe both sides have agreed. (Darling J.) Will it be printed every day? Will you have it transcribed? It makes a difference to what sort of note I take you see. (Sir Robert Finlay) We will have it copied, certainly. It will be in a form—— (Darling J.) So that I can have a copy of it? (Sir Robert Finlay) Certainly, my Lord. (Darling J.) If that is so I only take just enough for my own information and the case goes much quicker. (Sir Robert Finlay) Certainly, your Lordship shall have a copy." Mr. Duke

(1) [1914] 2 K. B. 529, at p. 540. (2) [1899] 2 Q. B. 488, at p. 494.
(3) [1914] 2 K. B. 529, at p. 542.

C. A. 1915

SEAL v. TURNER.

Bankes L.J.

appears to have been mistaken when he replied to the learned judge's question and stated that he believed that both sides were agreed. An attempt had been made to come to some arrangement, but it had failed. From that point the discussion was entirely between the learned judge and Sir Robert Finlay, and the necessary assent on the part of the plaintiff (if any) to create an agreement must be implied from the fact that Mr. Duke did not dissent from what passed between the learned judge and Sir Robert Finlay. The substance of what Sir Robert said was that his client was having a note taken and that he would have it copied and a copy should be supplied to the judge for his use so that it would not be necessary for him to take a full note. Under these circumstances I think that it is a necessary implication that the plaintiff assented to an expenditure the benefit of which he was to share equally with the defendant, and consequently that he would share that expense equally with the defendant. This expense is limited to the cost of creating the copy of the notes for the judge; that is to say, the cost of taking the note, of transcribing it, and of the copy for the use of the judge. I see no ground whatever for extending any implied agreement beyond this expenditure, or for suggesting that under the circumstances any similar arrangement should be construed as an agreement that the entire cost of the shorthand notes should be costs in the cause. It is very easy to make an arrangement to that effect if the parties so desire; but if no such agreement is expressly made it ought not to be implied unless the circumstances are very different from what they are in the present case. For these reasons I think that the appeal should be allowed, and the matter remitted to the Master for him to allow half the cost of making and of transcribing the note and half the cost of the copy for the judge, and I agree that each party should pay their own costs of this appeal. With regard to the application that the costs of the shorthand note should be allowed as part of the costs of the appeal to set aside the verdict and for a new trial, I agree that the costs of the shorthand note of the plaintiff's evidence should be allowed so far as those costs are not already covered by the arrangement between the parties.

C. A.
1915
SEAL
v.
TURNER.

WARRINGTON L.J. Two questions arise in this case: first, whether the costs of the shorthand notes of the trial ought to be allowed in the taxation of the defendant's costs of the action; secondly, whether the whole or any part of such notes should be included in the costs of the appeal to be paid by the plaintiff. As to the first question: At the trial judgment was entered for the defendant with costs to be taxed. No special direction that the costs should include those of the shorthand notes was given or even applied for. The taxing Master has nevertheless allowed those costs and Bailhache J. has refused to interfere. It is not quite clear on what principle the taxing Master acted—he says he considered the case to be within *Hebert* v. *Royal Society of Medicine* (1), from which I infer that he thought there was an agreement between the parties that these costs should be allowed, but he also says it was reasonable to take and transcribe the notes, and that if the matter were in his discretion he would allow the costs apart from authority. I am of opinion that in the absence of an express decision of the judge or an agreement by the parties that the costs of the shorthand notes should be costs in the action they ought not to be allowed on taxation. See per Parker J. in *Jones* v. *Llanrwst Urban Council* (2); *Kirkwood* v. *Webster* (3); *Ashworth* v. *Outram.* (4) The question then is, Was there in this case an agreement that the costs should be costs in the action? The only agreement made in open Court was that a note should be taken and transcribed and that the judge should have a copy, and inasmuch as the judge in terms said that the agreement of the parties would make a difference as to the note he would take I think it must be inferred that the parties agreed that the shorthand notes should be referred to in the Court of Appeal. The plaintiff admits that he agreed to pay one half the costs of the note and of the copy for the judge, and he in fact took and paid for a copy for himself. The defendant has in fact paid the whole costs of the note (namely, one half the shorthand writer's fee, the other half being borne by third persons), the costs of the transcript and of the judge's copy. In my opinion the plaintiff ought under the admitted agreement to

(1) 56 Sol. J. 107.
(2) [1911] 1 Ch. 393, 413.
(3) (1878) 9 Ch. D. 239, 242.
(4) (1878) 9 Ch. D. 483, 486.

C. A. 1915

SEAL v. TURNER.

Warrington L.J.

pay one half of the half fees paid to the shorthand writer and one half of the cost of the transcript and of the judge's copy. The latter could not have been made without a transcript, and the plaintiff's agreement to pay one half of the cost of the judge's copy involves in my opinion an agreement to pay one half of the cost of the transcript. Ought we to infer a further agreement, namely, that the entire costs of the notes including copies for counsel should be costs in the action? In my opinion we ought not. It seems to me eminently desirable that on a subject which in many cases involves an enormous addition to the expense the parties ought not to be held bound to any larger extent than is covered by their express agreement. It is true that in *Osmond* v. *Mutual Cycle and Manufacturing Supply Co.* (1) A. L. Smith L.J. expressed the view that an agreement similar to that made in the present case carried an agreement that the costs should be costs in the action. This was, however, a mere dictum, and all I think it necessary to say is that in the present case I cannot find such an agreement.

With regard to the case of *Hebert* v. *Royal Society of Medicine* (2), which I have mentioned before, this does not touch the present case; it was not a case of taxation at all, but, a question having arisen as to whether the costs of shorthand notes should be allowed as part of the costs of an appeal, the Court of Appeal there laid down certain conditions in the absence of which such costs should not be allowed, but, those conditions being fulfilled, they allowed the costs in that case. In my opinion, therefore, the plaintiff's objections in reference to the shorthand notes should be allowed and he should be charged only with one half, the one half fee and one half of the cost of the transcript and the judge's copy.

As to the second question, whether the costs of the note should be included in the costs of the appeal, I understand this has usually been done where an agreement has been made to the effect that the shorthand note should be referred to in place of the judge's note: *Hebert* v. *Royal Society of Medicine* (2), and per Vaughan Williams L.J. in *In re Roney.* (3)

(1) [1899] 2 Q. B. 488, at p. 494. (2) 56 Sol. J. 107.
(3) [1914] 2 K. B. 529, at p. 540.

In the present case, however, there was only one issue in the Court of Appeal. On this it was necessary only to refer to the plaintiff's evidence. I think the notes of his evidence only and of the summing-up should be included in the costs of the appeal.

C. A. 1915 SEAL v. TURNER.

Appeal allowed.

Solicitors: *S. S. Seal; Coward & Hawksley, Sons & Chance.*

H. C. R.

BEAL *v.* HORLOCK.

[1915 B. 1222.]

1915 *May* 18; *June* 4.

Ship—Seaman—Wages—Termination of Service—Detention in Enemy Port—"Loss of the ship"—Hague Conventions, 1907, *No. VI.—Merchant Shipping Act*, 1894 (57 & 58 *Vict. c.* 60), *s.* 158.

A British ship, during the voyage for which a British seaman had signed articles, being in a German port when war was declared between the United Kingdom and the German Empire, was detained and not allowed to leave and the crew imprisoned; and the ship and crew were still detained and imprisoned when this action for an allotment of wages was commenced:—

Held, that the service of the seaman was not terminated by "loss of the ship," within s. 158 of the Merchant Shipping Act, 1894, and that he continued to be entitled to wages.

Action tried before Rowlatt J. as a commercial cause, without a jury, upon an agreed statement of facts.

The plaintiff is the wife of T. R. Beal, who signed articles as second mate on board the *Coralie Horlock* on May 21, 1914, at Hull. In accordance with the provisions of ss. 140 and 141 of the Merchant Shipping Act, 1894, and s. 61 of the Merchant Shipping Act, 1906, Beal required a stipulation for the allotment of his wages, by means of an allotment note, to be, and the stipulation was in fact, duly inserted in the articles. So far as is material the articles were as follows:—"The several persons whose names are hereto subscribed, and whose descriptions are contained herein, and of whom eight are engaged as sailors,

1915

BEAL v. HORLOCK.

hereby agree to serve on board the said ship, in the several capacities expressed against their respective names, on a voyage not exceeding two years duration to any ports or places within the limits of 75 degrees North and 60 degrees South latitude, commencing at Hull, proceeding thence to Alexandria and/or any other ports within the above limits; trading in any rotation, and to end at such port in the United Kingdom or Continent of Europe (within home trade limits) as may be required by the master . . . . and it is also stipulated that advances on account and allotments of part of wages shall be made as specified against the names of the respective seamen in the columns provided for that purpose." In the "Particulars of Engagement" Beal's wages were stated to be 9*l.* 10*s.* per calendar month, and the amount of the monthly allotment to be 4*l.* 15*s.* An allotment note was duly issued in favour of the plaintiff for the sum of 4*l.* 15*s.* to be paid by the defendant to the plaintiff monthly during the period of the articles, the first payment to be made on June 22, 1914.

The vessel sailed from Hull at the end of May, 1914, upon the voyage in respect of which Beal had signed the articles and proceeded to Alexandria and from there to other ports, arriving at Hamburg on August 2, 1914. On and after August 4, 1914, a state of war existed between the United Kingdom and the Empire of Germany. The vessel was then and still is in the port of Hamburg and is unable to leave that port by reason of detention by the German authorities. The defendant has been since August 4, 1914, and still is deprived of the possession of the vessel, and Beal, with the officers and other members of the crew, was on or about November 2 removed from the vessel to a lodging ship in Hamburg and on or about November 8 was interned at Ruhleben near Berlin.

The defendant has paid to the plaintiff under the allotment note 4*l.* 15*s.* on June 23, 4*l.* 15*s.* on July 22, and 1*l.* 13*s.* 8*d.* on August 2, 1914, and no more, but has failed or refused to pay to the plaintiff any further sums under the allotment note.

The plaintiff contends that the wages of Beal are due and payable by the defendant under and in respect of the articles until he shall be discharged in accordance with the terms of the

articles and the provisions of the Merchant Shipping Act, 1894. By reason of and consequent upon that contention the plaintiff claims to be paid by the defendant the sum of 4*l.* 15*s.* monthly under the terms of the allotment note and the statutes (1) from and after July 22, 1914, and until Beal shall be discharged as aforesaid. The defendant contends that he is not liable to pay to Beal any wages after August 4, 1914, and in consequence is not liable to make any payment to the plaintiff beyond that already made.

A. Neilson, for the plaintiff. By s. 143 of the Merchant Shipping Act, 1894, the person in whose favour an allotment note is made is entitled to recover the sums allotted so long as the seaman is entitled to be paid his wages. The only question, therefore, is whether the plaintiff's husband has continued to be entitled to be paid his wages since August 4 last. That question must depend upon whether there has been a "loss" of the ship within the meaning of s. 158 of the Act, for in the circumstances of this case it cannot be said that the seaman ceased to be entitled to his wages for any other cause. The provisions of the first two articles of No. VI. (2) of the Hague Conventions of

(1) 57 & 58 Vict. c. 60, s. 143, subs. 1: "The person in whose favour an allotment note under this Act is made may, unless the seaman is shown, in manner in this Act specified, to have forfeited or ceased to be entitled to the wages out of which the allotment is to be paid, recover the sums allotted, when and as the same are made payable, with costs from the owner of the ship with respect to which the engagement was made, or from any agent of the owner who has authorised the allotment, in the same court and manner in which wages of seamen not exceeding 50*l.* may be recovered under this Act . . . ."

Sect. 158: "Where the service of a seaman terminates before the date contemplated in the agreement, by reason of the wreck or loss of the ship, or of his being left on shore at any place abroad under a certificate granted as provided by this Act of his unfitness or inability to proceed on the voyage, he shall be entitled to wages up to the time of such termination, but not for any longer period."

(2) Hague Conventions, 1907. Convention VI., art. 1: "When a merchant-ship belonging to one of the belligerent Powers is at the commencement of hostilities in an enemy port, it is desirable that it should be allowed to depart freely, either immediately or after a reasonable number of days of grace, and to proceed, after being furnished with a pass, direct to its port of destination or any other port indicated."

1915

BEAL v. HORLOCK.

1907 show that there has not been a capture or loss of this ship, but only a temporary detention. That distinguishes this case from *Sivewright* v. *Allen* (1), where the ship was captured and destroyed. A temporary embargo or detention is not a loss of the ship: *Beale* v. *Thompson* (2); *Thompson* v. *Rowcroft* (3); *Pratt* v. *Cuff* (4); *Delamainer* v. *Winteringham*. (5) It must not be assumed that the Germans will not observe the provisions of the Hague Convention, and that the ship will be confiscated and not released at the end of the war: *Mitsui* v. *Mumford*. (6) The decisions in cases upon policies of insurance as to constructive total loss have no bearing upon the question in this case. The service of the seaman not having been terminated within s. 158, his right to wages continues, under s. 134, until "final settlement": *Palace Shipping Co.* v. *Caine*. (7) [He referred also to *Melville* v. *De Wolf* (8), *Loweth* v. *Fothergill* (9), and *Austin Friars Shipping Co.* v. *Strack*. (10)]

W. N. Raeburn, for the defendant. There has been a "loss of the ship" within the meaning of s. 158. This is not a case of a merely temporary embargo of the ship; it is detained and will be detained for the duration of the war. There is nothing in this case to show that the ship will be released in accordance with the provisions of the Hague Convention. The provisions of s. 158 are not exhaustive; the service of a seaman may terminate, and his right to wages cease, for reasons other than those expressed in s. 158, for instance by his death. The detention of the ship by reason of the state of war has given rise to such an impossibility of performance on either side as to absolve both parties from further performance and terminate the con-

Art. 2: "A merchant-ship unable, owing to circumstances of force majeure, to leave the enemy port within the period contemplated in the above article, or which was not allowed to leave, cannot be confiscated. The belligerent may only detain it, without payment of compensation, but subject to the obligation of restoring it after the war, or requisition it on payment of compensation."

(1) [1906] 2 K. B. 81.
(2) (1804) 4 East, 546.
(3) (1803) 4 East, 34.
(4) (1798) cited 4 East, p. 43.
(5) (1815) 4 Camp. 186.
(6) [1915] 2 K. B. 27, at p. 34.
(7) [1907] A. C. 386.
(8) (1855) 4 E. & B. 844.
(9) (1815) 4 Camp. 185.
(10) [1905] 2 K. B. 315.

tract: *Geipel* v. *Smith* (1); *The Teutonia* (2); *The Olympic* (3); *Polurrian Steamship Co.* v. *Young*. (4) [He also referred to *The Florence* (5), *Rotch* v. *Edie* (6), *Hadley* v. *Clarke* (7), *The Elizabeth* (8), and *Embiricos* v. *Sydney Reid & Co.* (9)]

Neilson replied.

Cur. adv. vult.

June 4. ROWLATT J. This was an action by the wife of a seaman, the mate of a British ship, who was the holder of an allotment note duly issued entitling her during the period of his service to be paid a certain sum of money monthly out of his wages.

By s. 143 of the Merchant Shipping Act, 1894, it is provided as follows: [His Lordship read sub-s. 1.] The plaintiff was paid on her allotment note up to August 4, 1914, but has not been paid since. The ship on which her husband was serving, on August 2 last, had the misfortune to put into the port of Hamburg, where it was detained, and the plaintiff's husband was imprisoned, first of all upon a ship at Hamburg and afterwards in a prison near Berlin.

There is a Convention applicable to belligerent ships which are in an enemy port at the outbreak of war called the Hague Convention No. VI. of 1907. The first and second articles of that Convention are as follows: [His Lordship read them.] That second article seems to me to contemplate the case where, notwithstanding that it has been stated to be desirable that that should not take place, in point of fact the ship has been prevented from departing from the port and not allowed to leave, and it provides that it may not be confiscated. The belligerent may merely detain it on the condition of restoring it after the war without paying compensation, or he may requisition it on condition of paying compensation. There is no evidence before me that the ship has been requisitioned. Therefore I must take it that it is merely detained, and is not confiscated or

(1) (1872) L. R. 7 Q. B. 404.
(2) (1871) L. R. 3 A. & E. 394.
(3) [1913] P. 92.
(4) [1915] 1 K. B. 922.
(5) (1852) 16 Jur. 572.
(6) (1795) 6 T. R. 413.
(7) (1799) 8 T. R. 259.
(8) (1819) 2 Dods. 403.
(9) [1914] 3 K. B. 45.

1915

BEAL v. HORLOCK.

Rowlatt J.

requisitioned at present. I am, I think, bound to assume that the Convention is being applied to the ship. I am not at liberty to conjecture that the Convention is torn up or thrown to the winds. Under those circumstances the ship is still the property of her owner; the destination to which she is looking at the present moment is release at the close of the war; and in the meantime she is merely immobilized in the port of Hamburg.

I should mention, in passing, that the owner of the ship raises this point for the purpose of getting a legal decision upon the question which is of great importance. He must be absolutely acquitted of taking it in any spirit of meanness against the plaintiff or her husband. It was first argued for the defendant that, within the meaning of s. 158 of the Merchant Shipping Act, 1894, the service of the seaman had terminated before the date contemplated in the agreement "by reason of the loss of the ship," so that under that section his title to wages ceased at the time of such termination. Now what I have stated with regard to the position of the ship in Hamburg under the Hague Convention, if it is right, negatives any question of the loss of the ship. She is there; the property in her has not changed; she is simply detained; and, apart altogether from what was said in the case of *Sivewright* v. *Allen* (1), it is impossible to hold that this ship is lost.

Then it was said that s. 158 is not exhaustive in its mention of the causes which may put an end to the engagement of a seaman, and I think that contention is correct. In fact, when the section is looked at, it is not a section which declares that in certain events the seaman's engagement is terminated; all it does is to say that when the service terminates for any of the reasons mentioned in the section, assuming that upon general principles it may terminate apart altogether from the Act, then certain results shall follow. So far I agree with the argument for the defendant that the service may be terminated by causes other than those mentioned in s. 158; and it is not very difficult to see causes which may terminate it. For instance, the death of the seaman clearly determines it; and that is not mentioned in

(1) [1906] 2 K. B. 81.

s. 158, although there are other sections which point out what happens in the case of death. The service may be terminated by circumstances analogous to those which occur in the case of a seaman being taken out of a ship by an enemy ship. A seaman may be taken out of a neutral ship by a belligerent ship as a subject of an enemy or as a subject of the State to which the belligerent ship belongs, and the ship may be allowed to continue on her voyage. No one, I think, would contend that his service had not terminated under those circumstances, although not mentioned in s. 158. Again, his service might be determined as in the case of *Melville* v. *De Wolf* (1), where he was sent home from a foreign port by order of a naval Court to give evidence against the captain in this country. So I think we must assume that the service of the seaman may be determined by causes other than those mentioned in s. 158. If it is so terminated, whether, within the meaning of s. 143 as applicable to an allotment note, it can be shown "in manner in this Act specified" that the seaman has ceased to be entitled to the wages, is perhaps rather a difficult question; but I do not think it is necessary to go into that point. I do not think it is necessary for the reason that it seems to me that the service is not on any ground terminated as yet by what has happened in regard to this ship. It is not only that it cannot be "shown in manner in this Act specified" that the seaman has ceased to be entitled to the wages, but apart altogether from that he has not in fact or in law ceased to be entitled to wages.

The position with regard to this ship at the present moment, and of the husband of the plaintiff, is exactly what it was during the detention of the ship and the imprisonment of the plaintiff in the case of *Beale* v. *Thompson*. (2) At the time when that decision was given the question whether the engagement had determined could not be tried in an action for wages during the period of the detention because no such action could then be brought until the voyage had been completed. But s. 143 of the Merchant Shipping Act, 1894, now compels me, without waiting to see what the event will be, to decide whether to-day the seaman has ceased to be entitled to wages. I cannot hold

(1) 4 E. & B. 844.
(2) 4 East, 546.

1915

BEAL v. HORLOCK.

Rowlatt J.

that to be the case when, in the light of the Hague Convention, the event may be, and I ought to assume will be, the same as that which took place in *Beale* v. *Thompson*. (1) The seaman's engagement, as pointed out by Kennedy L.J. in *The Olympic* (2), is not lightly dissolved. In the present state of facts I must hold that the service of the plaintiff's husband is not yet terminated. Under these circumstances I must give judgment for the plaintiff for the amount of the allotment note up to the date of the writ.

Judgment for plaintiff.

Solicitors for plaintiff: *Botterell & Roche, for Sanderson & Ferens, Hull.*

Solicitors for defendant: *Holman, Birdwood & Co.*

J. H. W.

C. A.

1915

June 1, 18.

[IN THE COURT OF APPEAL.]

COOPER *v.* WALES, LIMITED.

Employer and Workman—Compensation—Arbitration—Jurisdiction—Question arising—Liability to pay Compensation—Duration of Compensation—Workmen's Compensation Act, 1906 (6 *Edw.* 7, *c.* 58), *s.* 1, *sub-s.* 3.

A workman, whilst employed by the respondents, met with a severe accident to his left hand, which caused for the time total incapacity. The respondents offered to pay full compensation during total incapacity. This was declined on the ground that the workman was not prepared to accept an admission limited to total incapacity only. The result was that the compensation offered was not accepted by the workman, and he applied to have the compensation fixed by arbitration:—

Held, that *Payne* v. *Fortescue & Sons* [1912] 3 K. B. 346 had not been overruled, but was distinguishable on the facts; that a question had arisen within s. 1, sub-s. 3, of the Workmen's Compensation Act, 1906; and that there was jurisdiction to entertain the application.

APPEAL from an award of the judge of the Birmingham County Court sitting as arbitrator under the Workmen's Compensation Act, 1906.

Horace Cooper was employed by the respondent company, Wales, Limited, as a circular sawyer, and on October 28, 1914, met with an accident by which he lost parts of the fingers and

(1) 4 East, 546. (2) [1913] P. 92.

thumb of his left hand. The effect of the correspondence between his solicitors and the employers was stated by Lord Cozens-Hardy M.R. as follows :—

Formal notice of the accident was given on October 30 and the claim to compensation was made on November 10 by a letter from the applicant's solicitors, which ended as follows : "Kindly let us hear whether liability is admitted to pay compensation during Cooper's incapacity in accordance with the terms of the Workmen's Compensation Act, 1906." On November 12 the insurance office, which for this purpose represented the employers, replied that they had instructed the employers to pay compensation "during his total incapacity as a result of the accident in accordance with the terms of the Workmen's Compensation Act, and in view of this fact, we presume you will agree that there is nothing further to be done at the moment." On November 16 the solicitors replied: "The Act provides that compensation is to be paid during incapacity, and he is not prepared to accept an admission limited to total incapacity only." On November 17 a reply was sent: "We are quite willing that a memorandum of agreement to pay wages during total incapacity should be recorded, but of course only this."

On November 17 the workman applied for arbitration, stating his wages at 36*s.* a week and claiming 18*s.* a week compensation, and alleging that the questions which had arisen were the extent of the liability of the employers and the duration of the compensation payable by them. At the date of his application he had received no compensation from the employers. The respondents answered that no question had arisen and that they had tendered compensation. The learned county court judge held that a question had arisen, and he ordered the sum of 18*s.* to be paid weekly as from the date of the accident during the total or partial incapacity of the applicant for work, or until the same should be ended, diminished, increased or redeemed in accordance with the provisions of the Act.

The employers appealed.

J. F. Eales, for the appellants. No question had arisen within s. 1, sub-s. 3, of the Act of 1906, and the learned judge

C. A. 1915

COOPER v. WALES, LIMITED.

had no jurisdiction to make an award. The employers admitted liability during total incapacity and were prepared to deal with partial incapacity if and when that state of things took place. There may be a question of duration at some future day, but it has not arisen yet. The case is covered by *Payne* v. *Fortescue & Sons* (1), which was followed in *Sampson* v. *General Steam Navigation Co.* (2) and was discussed and not overruled in *Summerlee Iron Co.* v. *Freeland.* (3) It was also followed in *Bedwell* v. *London Electric Ry. Co.* (4) The employers have offered the money to the applicant and he has refused to take it, so he cannot distinguish this case on the ground that he has received nothing. The receipt of compensation was not the basis of the judgments in *Payne* v. *Fortescue & Sons.* (1)

Artemus Jones, for the respondent. The question is whether a question had arisen at the time when the award was made, and the applicant submits that there were questions as to liability and amount and duration. It would be obviously unfair to postpone these questions and leave the applicant, in the event of partial incapacity supervening, to take fresh proceedings and prove his case when his witnesses may have left the neighbourhood. The agreement ought to have provided for partial incapacity as in Form 1 of Appendix R given in Adshead Elliott on the Workmen's Compensation Act, 5th ed., p. 665. The employers have declined to give the general admission of liability to which the applicant claims to be entitled. There is therefore no agreement. In *Payne* v. *Fortescue & Sons* (1) there was a general admission of liability and the workman had accepted payment. Such a payment is a material consideration: *John Brown & Co.* v. *Hunter.* (5)

J. F. Eales in reply.

Cur. adv. vult.

June 18. LORD COZENS-HARDY M.R. The only point in this appeal is whether there was any jurisdiction to make an award in favour of the applicant. Arbitration proceedings can only be commenced if a question has arisen between the workman

(1) [1912] 3 K. B. 346.
(2) (1914) W. C. & Ins. Rep. 346.
(3) [1913] A. C. 221.
(4) (1914) W. C. & Ins. Rep. 408.
(5) (1912) 49 Sc. L. R. 695.

and his employer : see s. 1, sub-s. 3, of the Act. [His Lordship stated the effect of the correspondence between the parties.]

It seems to me that a question had arisen between the parties which sufficed to give jurisdiction to the Court. The employers never admitted, and indeed declined to admit, liability to pay compensation except during total incapacity; the workman said he was entitled to an admission of liability to pay compensation to the extent of his statutory rights. The difference is important, not a mere matter of form. It would affect the onus of proof in the event of total incapacity having ceased and partial incapacity still existing. I should add that although half wages have been tendered to the man, he has declined to accept them.

In these circumstances I think, unless we are precluded by authority, the view of the county court judge was correct. But it is contended that the decision of this Court in *Payne* v. *Fortescue & Sons* (1) is directly in point. I do not think this is so; in that case there was an unconditional admission of liability not limited to the duration of total incapacity. That case cannot be regarded as overruled by the decision of the House of Lords in *Summerlee Iron Co.* v. *Freeland.* (2) This was so held by this Court in *Sampson* v. *General Steam Navigation Co.* (3) Having regard to the comments made by the House of Lords upon *Payne* v. *Fortescue & Sons* (1) we must be careful in applying *Payne* v. *Fortescue & Sons* (1), where the facts are not substantially identical. For the reasons stated above, I think the facts in the present case are different, and I am at liberty to decide the present case in accordance with my own view of what is right.

There is another point, to which I do not attach much importance, but it is well to mention it. In *Payne* v. *Fortescue & Sons* (1) payments had been made to the man; in the present case no payment has been made. The fact of payment having been made to and accepted by the man may be some evidence of waiver of any objection to the form of admission. The result is, in my opinion, that the appeal must be dismissed with costs.

(1) [1912] 3 K. B. 346. (2) [1913] A. C. 221.
(3) (1914) W. C. & Ins. Rep. 346.

C. A. 1915

COOPER v. WALES, LIMITED.

PICKFORD L.J. In this case the point for decision is whether a question has arisen between the workman and his employers so as to make arbitration proceedings possible under s. 1, sub-s. 3, of the Workmen's Compensation Act, 1906. If such a question has arisen it has not been settled by agreement.

The facts are simple. The workman sustained an accident which for the time produced total incapacity, and it is not disputed that it was an accident which would entitle him to compensation under the Act. Notice of the accident was given, and the employers were asked if they would admit liability. In answer, their insurance company offered to pay compensation during total incapacity. The workman declined this offer, and asked for an admission of liability to pay compensation during total and partial incapacity, which the insurance company refused. The effect of the correspondence in my opinion was that the workman asked for an agreement to pay, or an admission of liability to pay, compensation under the provisions of the Act during total or partial incapacity, the amount being fixed in the first instance at half his wages subject to its being reduced or terminated by the Court at the instance of the employer. All these terms may not have been set out at length, but that in my opinion is what he asked. The employers through their insurance company refused to make this agreement, or give this admission, and offered an agreement to pay compensation during total incapacity, and no longer, saying that the question of partial incapacity should be dealt with when it arose. The difference of these two agreements is obvious. Under the former the workman would have an agreement which he could enforce during any measure of incapacity although the amount payable could be reduced, in case the incapacity became partial, by the Court on the application of the employer. Under the latter he would have an agreement quite valueless in the case of partial incapacity, and he would have to institute independent proceedings, or make a fresh agreement, in order to get compensation in that case. It is not necessary to decide which of the parties was right, though I think the workman was, for he was only asking what an award would give him. (See Appendix C, Form 24.) But whichever was right, I think it impossible to

say that, when one party asks for one agreement and the other refuses it and offers a totally different one, no question has arisen between them. The question was this: Was the workman to have an agreement to pay him compensation during total incapacity only, or during that and partial incapacity? How can this be said not to be a question as to the duration of compensation? It seems to me to be no answer on the part of the employer to say incapacity at the moment was total and not partial and when partial incapacity arose he would probably make an agreement as to it—the question as to liability in that case had already arisen although the actual amount payable could not then be determined. That question was not settled by agreement, and therefore the workman had a right to have it settled by arbitration.

So far I have dealt with the case apart from authority, but it is argued for the employer that the point has been settled adversely to the opinion I have expressed above. The authority referred to is the case of *Payne* v. *Fortescue & Sons.* (1) The two other cases referred to of *Sampson* v. *General Steam Navigation Co.* (2) and *Bedwell* v. *London Electric Ry. Co.* (3) did not add anything to the authority of *Payne* v. *Fortescue & Sons* (1), but merely followed it as binding upon the Court where the circumstances could not be distinguished. On the other hand it was contended that the authority of that case was destroyed by the decision of *Summerlee Iron Co.* v. *Freeland* (4) in the House of Lords, and also that the circumstances of this case were distinguishable from those of *Payne* v. *Fortescue & Sons.* (1) I am of the same opinion that I expressed in *Bedwell* v. *London Electric Ry. Co.* (3), that *Payne* v. *Fortescue & Sons* (1) in the same circumstances is still binding on this Court. The House of Lords had an opportunity of overruling that case, or so disapproving of it as to destroy its authority, but they refrained from doing so, merely saying that they did not assent to some of the reasoning contained in it without specifying to what particular reasoning they alluded. They then distinguished it from the case under their

(1) [1912] 3 K. B. 346.
(2) (1914) W. C. & Ins. Rep. 346.
(3) (1914) W. C. & Ins. Rep. 408.
(4) [1913] A. C. 221.

C. A. 1915

COOPER v. WALES, LIMITED.

Pickford L.J.

consideration at the time. I think it therefore remains a binding authority, though it will no doubt require careful consideration in connection with *Summerlee Iron Co.* v. *Freeland* (1) in order if possible to discover and not follow the part of the reasoning disapproved by the House of Lords.

It remains therefore to be seen if the case now before us can be distinguished from *Payne* v. *Fortescue & Sons.* (2)

The two main distinctions contended for were: (1.) That in *Payne* v. *Fortescue & Sons* (2) and the cases which followed it the workmen had received payment under the employers' proposed terms, and therefore might be said to have acquiesced in them, while here no such payment had been made. Such a payment seems to have been mentioned as having some importance in Lord Salvesen's judgment in the Court of Session in *Freeland* v. *Summerlee Iron Co.* (3) (2.) That in those cases there was an unconditional admission of liability, while in this case there was not. It is the fact that the employers were pointedly asked in this case to make such an unconditional admission, and they did not make it, though it may be doubtful whether their conduct was not such as to preclude them from denying such liability. I think I am entitled to say that there is at least as much difference between the facts of this case and those of *Payne* v. *Fortescue & Sons* (2) as between those of *Payne* v. *Fortescue & Sons* (2) and *Summerlee Iron Co.* v. *Freeland* (1), and as the House of Lords considered them sufficient to distinguish one case from the other, it is open to me to distinguish this case from *Payne* v. *Fortescue & Sons.* (2)

I do not therefore think that I am precluded by authority from holding that a question had arisen in this case which entitled the workman to ask for arbitration, and that the judgment of the county court judge should be affirmed.

WARRINGTON L.J. This is an appeal by the employers from an award by the county court judge at Birmingham finding the workman entitled to 18*s.* a week compensation during the total or partial incapacity of the workman for work or until the same

(1) [1913] A. C. 221. (2) [1912] 3 K. B. 346.
(3) (1912) 49 Sc. L. R. 841.

shall be ended, diminished, increased or redeemed in accordance with the provisions of the Act.

The ground of the appeal is that no question had arisen such as is mentioned in s. 1, sub-s. 3, of the Act, and that consequently the arbitrator had no jurisdiction to make the award. [His Lordship stated the facts and continued:]

These facts seem to me to raise a question, if not as to the liability, at all events as to the duration of the liability, and bring the case within the decision of the House of Lords in *Summerlee Iron Co.* v. *Freeland.* (1) *Payne* v. *Fortescue & Sons* (2) would appear not to have been overruled by *Summerlee Iron Co.* v. *Freeland* (1) (see *Sampson* v. *General Steam Navigation Co.* (3)) and to be a binding authority wherever the facts cannot be distinguished from the facts in that case. In my opinion the facts in the present case are distinguishable from those in *Payne* v. *Fortescue & Sons* (2) and are undistinguishable from those in *Summerlee Iron Co.* v. *Freeland.* (1) In this case, and in *Summerlee Iron Co.* v. *Freeland* (1), if there was any admission of liability it was confined to a particular period. In *Payne* v. *Fortescue & Sons* (2) there was an unlimited admission of liability, and the only possible question, namely, as to the amount of compensation during future partial incapacity if any, had not arisen. In the present case, as in *Summerlee Iron Co.* v. *Freeland* (1), there is an immediate question to be determined, namely, whether the applicant is entitled to an award or an agreement which would settle the duration of liability, a matter left unsettled by the offers made on the employers' behalf.

In my opinion the county court judge had jurisdiction to make the award, and this appeal fails.

Appeal dismissed.

Solicitors: *Nash, Field & Co., for Blewitt & Co., Birmingham; Kingsley Wood & Co., for Bowman & Ekins, Birmingham.*

(1) [1913] A. C. 221. (2) [1912] 3 K. B. 346.
(3) (1914) W. C. & Ins. Rep. 346.

H. C. R.

C. A.
1915
June 10.

[IN THE COURT OF APPEAL.]

J. & C. HARRISON, LIMITED *v.* DOWLING.

Employer and Workman—Injury by Accident—Compensation—Workman in receipt of Compensation—Enlisting in Army—Serving Abroad—Suspension of Compensation—Workmen's Compensation Act, 1906 (6 *Edw.* 7, *c.* 58), *Sched. I.* (14.), (18.)—*Workmen's Compensation Rules, r.* 66.

A workman who had been injured by accident within the meaning of the Workmen's Compensation Act, 1906, and was in receipt of compensation under an award during partial incapacity, enlisted in the Army and was sent with his regiment to India. The employers having applied for a review and termination of the compensation desired to have an opportunity of medically examining the workman, but in the circumstances they abandoned that application and asked for a suspension of the compensation on the grounds (1.) that by leaving the country the respondent had obstructed the holding of a medical examination under Sched. I. (14.) of the Workmen's Compensation Act, 1906; and (2.) that by ceasing to reside in the United Kingdom he had forfeited his right to compensation under Sched. I. (18.) of the Act:—

Held, that the workman had neither obstructed the medical examination nor ceased to reside in the United Kingdom within the meaning of the Act.

Appeal from an award of the judge of the Croydon County Court sitting as arbitrator under the Workmen's Compensation Act, 1906.

On October 14, 1912, J. H. Dowling, who was employed as an engineer upon a ship belonging to the appellants, was injured by accident while engaged in his duties on board the vessel. He received compensation from the appellants at the rate of 1*l.* a week up to February 4, 1913, when an award was made in his favour of 15*s.* a week from that date. In September, 1914, he enlisted in the East Surrey Territorial Regiment of the Army, upon hearing of which on October 21, 1914, the appellants ceased to pay the compensation. In January, 1915, the workman applied for leave to issue execution against the appellants, who thereupon commenced proceedings for the review and termination of the weekly payments. Some correspondence took place between the solicitors of the parties from which it appeared that the man had been ordered to India

C. A.
1915
J. & C. HARRISON, LIMITED v. DOWLING.

with his regiment and was now stationed at Cawnpore. In consequence of this the appellants, who desired to have him medically examined, were unable to do so. In March, 1915, the proceedings for a review came on for hearing, when the appellants obtained leave to amend their application by asking for a suspension of the compensation on the following grounds: (1.) that by leaving the country the workman had obstructed the holding of a medical examination within Sched. I. (14.) of the Workmen's Compensation Act, 1906; or (2.) that by ceasing to reside in the United Kingdom he had forfeited his right to compensation under Sched. I. (18.).

By Sched. I. (14.) it is provided that any workman receiving weekly payments under the Act shall, if so required by the employer, from time to time submit himself for medical examination; and if he refuses to do so, or in any way obstructs such examination, his right to compensation shall be suspended.

Sched. I. (18.) provides that if a workman receiving a weekly payment ceases to reside in the United Kingdom he shall thereupon cease to be entitled to receive any weekly payment unless the medical referee certifies that the incapacity resulting from the injury is likely to be of a permanent nature.

The county court judge dismissed the application, and the employers now appealed from that decision.

W. H. Duckworth, for the appellants. By going to India the respondent has in effect obstructed the medical examination to which the appellants are entitled. At any rate by ceasing to reside in the United Kingdom he has lost his right to compensation: Sched. I. (14.) and (18.). The county court judge held that Sched. I. (18.) did not apply unless there was an intention on the part of the workman permanently to cease residing in the United Kingdom, but that view is not warranted by the language of the schedule nor of r. 66 of the Workmen's Compensation Rules, upon which the judge relied. The operation of clause 18 ought not to be so restricted. It was the duty of the workman before leaving the United Kingdom to obtain a certificate from the medical referee.

Harney, for the respondent, was not called upon.

C. A. 1915

J. & C. HARRISON, LIMITED v. DOWLING.

LORD COZENS-HARDY M.R. There are two points raised by this appeal, but only one of them has been pressed.

An accident occurred to the workman, and his employers paid him compensation at varying rates, which are not now material. Last September the man enlisted in the Territorials, in the East Surrey Regiment, and by order of the military authorities his regiment has been sent to India, and the man is at present at Cawnpore with the regiment. An award had been made on February 4, 1913, of 15*s.* a week, and the employers having stopped payment of this, the workman applied to issue execution, and, according to the usual procedure in these cases, the employers met this by an application to terminate the award. They then desired to have him medically examined, but were told that he was in India, and they now say that under Sched. I., clause 14, of the Act the payment of compensation ought to be suspended. This clause provides as follows: "Any workman receiving weekly payments under this Act shall, if so required by the employer, from time to time submit himself for examination by a duly qualified medical practitioner provided and paid by the employer. If the workman refuses to submit himself to such examination, or in any way obstructs the same, his right to such weekly payments shall be suspended until such examination has taken place." I cannot find that there has been any refusal by the workman to submit to an examination. I am quite aware of the correspondence between the solicitors, but there is certainly nothing in this amounting to a refusal to submit to examination. Nor do I see that there is any evidence that he is obstructing the same. His being in India with his regiment, under military control, does not seem to me to amount to obstruction within the meaning of that clause. I am not at all satisfied that he might not be required by the employers to submit to examination in India by a duly qualified practitioner, it may be the regimental surgeon at Cawnpore. It seems to me that might be the case.

Then it is said that this man is no longer in the United Kingdom, and that this disentitles him to compensation, as he has not obtained a certificate of the medical referee that the incapacity is likely to be permanent. Of course he is not physically within the United Kingdom; he is at Cawnpore; but the Act does not

C. A.
1915
J. & C. HARRISON, LIMITED v. DOWLING.
Lord Cozens-Hardy M.R.

say—and I am satisfied that it does not intend to say—that the mere fact that a workman is for the moment not in truth physically in the United Kingdom deprives him of compensation or authorizes its suspension. To my mind it contemplates a case of permanent departure from the United Kingdom, as when a workman who is in receipt of compensation emigrates to Canada or the United States. Sched. I., clause 18, provides: "If a workman receiving a weekly payment ceases to reside in the United Kingdom, he shall thereupon cease to be entitled to receive any weekly payment, unless the medical referee certifies that the incapacity resulting from the injury is likely to be of a permanent nature." When I look at r. 66 of the Workmen's Compensation Rules it seems to me to be quite clear what is intended. Rule 66 (1.) provides that "Where a workman receiving a weekly payment intends to cease to reside in the United Kingdom the following provisions shall have effect." Then sub-r. 2 provides that the workman may then apply to the registrar "to refer to a medical referee the question whether the incapacity of the workman resulting from the injury is likely to be of a permanent nature"; and sub-r. 5 says, "On the hearing of the application the registrar, on being satisfied that the applicant has a bona fide intention of ceasing to reside in the United Kingdom, shall make an order referring the question to a medical referee." I cannot bring myself to believe that this has any application to the case of a soldier who may be ordered to Edinburgh or York, and then from there to Jersey or Gibraltar, without any intention on his part to change his residence. I think that it has no application to a case where a soldier in obedience to military orders simply follows his regiment about. In my opinion the county court judge was quite right in the view which he took, and the appeal must therefore be dismissed with costs.

PICKFORD L.J. I am of the same opinion.

WARRINGTON L.J. I agree.

Appeal dismissed.

Solicitors: *Holman, Birdwood & Co.; Lowless & Co.*

G. A. S.

C. A.
1915
June 7, 8, 18.

[IN THE COURT OF APPEAL.]

ROPER *v.* HUSSEY-FREKE.

Employer and Workman—Compensation—"Workman"—Contract of Service—Independent Contractor—Average Weekly Earnings—Deductions from Wages—Necessary Assistance—Workmen's Compensation Act, 1906 (6 *Edw.* 7, *c.* 58), *s.* 13; *Sched. I., par.* 2 (*a*).

A workman was employed as a dairyman on the terms of a written agreement which described the parties to it as employer and employee, provided that the latter should inter alia manage a herd of forty-five cows, and that several things should be done according to the instructions or desire or directions of the employer. The employer was to give 45*s.* a week with house and garden and certain extras. The employee kept a boy at 3*s.* 6*d.* a week to assist him in the work, and his own two sisters lived with him and helped in the dairy. He paid the boy's wages and boarded him and also paid allowances to, and the board of, his sisters. In proceedings by him for compensation under the Workmen's Compensation Act, 1906:—

Held, on the construction of the agreement, that the applicant was a "workman" within the Act and not an independent contractor; and that expenses of help given by younger members of the family who lived with the workman ought not to be deducted from his wages in the absence of an express contract or proof that he could not earn his wages without their assistance.

Appeal from an award of the judge of the Bridport County Court sitting as arbitrator under the Workmen's Compensation Acts, 1897 and 1906.

Ernest John Roper whilst employed by E. J. Hussey-Freke as a dairyman met with an accident which broke his thigh. He was employed on the terms of a written agreement which provided for wages 2*l.* 5*s.* a week and certain emoluments estimated at 16*s.* 6½*d.*, which altogether amounted to 3*l.* 1*s.* 6½*d.* He admitted that the wages, 3*s.* 6*d.* a week, of a boy employed by him and 3*s.* 6*d.* a week for his board were necessary expenses and should be deducted from his wages. He also made allowances to his two sisters who lived with him and helped him, but denied that their allowances and the cost of their board ought to be deducted.

The county court judge held that the applicant was a workman within the Act; that the expenses of the boy, 7*s.* a week, were

necessary to the applicant's earning his wages and must be deducted from them, but that the sisters' expenses ought not to be deducted; the balance of his wages would be substantially above 2*l.* a week, so he awarded him 1*l.* a week to the date of the hearing, but reduced it to 16*s.* a week from that date on the ground that he could now do light work.

The employer appealed, except as to the deduction of the board and wages of the boy, and there was no appeal on that point.

The agreement was as follows:—

"Coombe Farm
"Litton Cheney
"nr. Dorchester.

"An agreement made this first day of January 1914 between Eric John Hussey-Freke of Coombe Farm Litton Cheney, the employer of the one part, and Ernest Roper the employee of the other part. Whereas the said employee agrees to take charge of and manage up to the number of 45 cows and heifers, constituting the herd at Coombe Dairy, the said employer having the right to change same by drafting or otherwise, as he thinks fit. To feed them according to instructions from the employer to the best of his ability, and to tend and care for them in a rightful manner. To prevent waste in all forms. To manufacture the milk into goods as may be desired by the employer. To keep all pigs that may be on the premises cleaned out and littered daily and to feed and look after them to the best of his ability. To ring and castrate all pigs and to prevent them from rooting up the land and straying. To feed and look after one or two bulls as may be required by the employer. To rear as many calves as may be required by the employer, also to see the cows once or twice daily whilst running out; and to report to the employer any dangerous places or gaps so as to prevent accidents to the stock, and to keep cows in such fields as the employer requires. To take to or bring back from the market or station any goods, calves, pigs, when required to do so by the employer. The horse and conveyance to be found by the employer. To keep all the premises and utensils clean and tidy, the manure in the yards in heaps, and to whitewash the cowstalls and piggeries

C. A. 1915

ROPER v. HUSSEY-FREKE.

when required to do so. Providing the above conditions are carried out the employer agrees to the following; viz.:— To give 45 shillings per week with house and garden known as the Dairy House. To allow 5 tons of coal and 100 wood faggots for use in manufacturing the goods. To allow one pint of milk daily and one pound butter weekly. To give 6*d.* per couple for all chickens reared, and 1*d.* per dozen for all eggs delivered to the farm; 1*s.* per head for all calves reared; 6*d.* per head for all pigs sold. Should the herd be raised to more than 45 cows and heifers, the employer to pay 1*s.* per week per head on the extra quantity. Either party has the power to cancel this agreement by giving 3 months notice in writing."

W. Shakespeare, for the appellant. The question whether the applicant was a workman within the Act depends upon the construction of the agreement, and the employer contends that it is clear from the terms of it that he was not a workman but an independent contractor. It was obviously impossible for him to do all the work himself and he had to obtain skilled assistance for the purposes of the dairy. The use of the words "employer" and "employee" is not enough to show the contrary. The payments he was to receive were not really wages. This is not a contract of service within s. 13 of the Act of 1906, but a contract for services: *Simmons* v. *Heath Laundry Co.* (1) Secondly, the expenses incurred for his sisters were necessary to enable him to perform his duties; in fact it is stated that the eldest was a skilled professional dairymaid. He did not make them an allowance but had to pay them wages, and their wages and expenses ought to be deducted from his earnings.

Ellis Hill, for the applicant (not called upon to argue the question of the contract of service). The learned judge was right in not allowing the deduction of the allowances to the applicant's sisters. The question is what were his earnings within Sched. I., paragraph 2? No rules were laid down in the Act of 1897 for determining "earnings" and it was held that gross earnings were intended: *Midland Ry. Co.* v. *Sharpe* (2);

(1) [1910] 1 K. B. 543. (2) [1904] A. C. 349.

Abram Coal Co. v. *Southern.* (1) That has not been altered by Sched. I., paragraph 2, of the Act of 1906, which provides how earnings are to be computed, and paragraph 2 (*a*) says that they shall be computed "in such manner as is best calculated to give the rate per week at which the workman was being remunerated." That has been held not to alter the law: *Perry* v. *Wright.* (2) Remuneration means the amount which the workman received; the test is not what profits he made: *Abram Coal Co.* v. *Southern.* (1) Recognized tips may be taken into account: Willis's Workmen's Compensation, 15th ed., p. 158; *Houghton* v. *Sutton Heath and Lea Green Collieries Co.* (3) The only alteration has been with reference to "special expenses" under Sched. I., paragraph 2 (*d*). Here the employer has signed an agreement to pay 45*s.* and extras, and any sums which the workman has to pay for additional labour cannot be deducted.

W. Shakespeare in reply. The cases relied on by the respondent were under the old law and do not refer to the rate of remuneration under Sched. I., paragraph 2. That says that "average earnings" mean the sum which the workman actually gets. Therefore the expenses of the sisters ought to be deducted: *Shipp* v. *Frodingham Iron and Steel Co.* (4)

Cur. adv. vult.

June 18. LORD COZENS-HARDY M.R. The question in this appeal is, first, whether the applicant, who met with an admitted accident arising out of his employment, was a "workman" within the meaning of the Act. Secondly, if he was a "workman," what deductions, if any, ought to be made from his emoluments in order to arrive at the maximum amount which he could receive as compensation. Mr. Hussey-Freke has a dairy farm, and he determined to engage the applicant "to take charge of and to manage" a herd at Coombe Dairy. It was a large herd of forty-five cows and heifers. The terms arranged are in writing, dated January 1, 1914, and it is upon the construction of this document that the nature of the relations between the parties depends. Without going through all the terms, I am

(1) [1903] A. C. 306.
(2) [1908] 1 K. B. 441.
(3) [1901] 1 Q. B. 93.
(4) [1913] 1 K. B. 577, 581, 583.

C. A. 1915

ROPER v. HUSSEY-FREKE.

Lord Cozens-Hardy M.R.

clearly of opinion that the applicant was a "workman." He was to feed the herd "according to instructions from the employer," and to "manufacture the milk into goods as may be desired by the employer," by which I understand that he was to make cheese or butter as the employer might direct. He was to do several other things "as may be required by the employer." The employer was to give "45*s.* per week, with house and garden known as the dairy house," with certain extras. All this is consistent only with the position of a "workman." The first question must therefore be answered in favour of the applicant.

The second question arises in a curious way. As the work of the dairy was more than one man could perform, he hired a boy of fifteen to whom he paid 3*s.* 6*d.* a week with board and lodging, calculated at 3*s.* 6*d.*, making in all 7*s.* wages. He had two younger sisters living with him who helped him; to them he attributed, in the shape of money and board with dress allowance, 15*s.* 9*d.* a week. There is no evidence of a contract between the man and his sisters for payment of wages as such. He "gave" them certain sums and considered their board as worth a certain sum. In these circumstances can 7*s.* a week to the boy be deducted? The county court judge has deducted the 7*s.*, and there is no appeal on this point. But he has refused to deduct the sums which the man attributes to the services of the younger sisters. I think this was right. Help given by younger members of the family who live all together should not be treated as a deduction from the man's wages in the absence of an express contract. It may be quite clear that the man could not have earned the wages without such help. The workman must have food and boots in order to do his work and earn wages. But it cannot be seriously suggested that the cost of the food and boots is a "deduction" from his wages, it is rather the mode in which part of his wages is expended.

I think the appeal fails and must be dismissed with costs.

PICKFORD L.J. The first question to be decided in this case is whether the applicant was a "workman" within the meaning of the Workmen's Compensation Act, 1906. This depends upon

the construction to be put upon the written agreement between the parties.

I do not think it necessary to examine the agreement in detail, as it has already been discussed by the Master of the Rolls. I think that looking at the nature of the services to be rendered by the applicant and the control to be exercised by the respondent the relationship was that of master and servant, and not contractors, and, therefore, that the applicant was a "workman" within the meaning of the Act.

The other question is as to the deductions, if any, to be made from the sum of 45*s.* payable to the applicant under the agreement in order to ascertain what were his weekly earnings. He paid for assistance in his work 6*s.* to one of his sisters, 2*s.* and 9*d.* dress allowance to another, and 3*s.* 6*d.* to a boy whom he hired, and he provided each of them with board and lodging at an estimated cost of 3*s.* 6*d.* a week. The county court judge allowed a deduction of 7*s.* for the boy but disallowed any deduction in respect of the sisters, and against this disallowance the employer appealed.

Prima facie the weekly sum paid to a servant is paid as his wages, but there may be circumstances which show that part of that sum although paid to him is not really part of his earnings, but paid to him for another purpose, and in that case such part must be deducted in calculating his earnings. I think that to justify such a deduction there must at least be a finding of the existence of one of two things: 1. An agreement by which the workman has to pay over part of what he receives for some purpose other than to remunerate himself. 2. A payment made out of the sum received by him for assistants or other purposes so necessary to the performance of his duties that it must be taken that part of the sum paid to him is to be applied to such purposes. I wish to guard myself against saying that either of these facts would necessarily justify such a deduction, but I do not think that in the absence of both of them it can be justified. Neither of these things exists here. There was no agreement of the kind mentioned, and the learned county court judge has not found the sisters' assistance necessary, though he has so found as to the boy's assistance. I think he

C. A. 1915

ROPER v. HUSSEY-FREKE.

Pickford L.J.

meant to draw a distinction between the two classes of service and to find one necessary and the other not, and I think there was evidence on which he could so find, though he could also have found the other way as to the sisters' services.

There is no appeal as to the deduction of the sum in respect of the boy, and it is unnecessary to express any opinion as to whether that part of the decision was right.

The appeal must be dismissed.

WARRINGTON L.J. There are two questions in this case—(1.) whether the judge was right in treating the applicant as a workman; (2.) whether in arriving at his average weekly earnings he ought to have deducted certain sums in respect of wages and board and lodging paid and allowed respectively by the applicant to two sisters who lived with him and helped him in his work.

The relations between the applicant and the respondent were regulated by an agreement in writing dated January 1, 1914. The respondent is there called the employer, the applicant is called the employee. The employment was that of taking charge of and managing a herd of forty-five cows and heifers. The employer in terms reserved the right of giving instructions to the employee in respect of several matters of detail. The remuneration was to be 45*s.* a week with a house and garden and certain extra allowances. I am of opinion that the agreement was a contract of service and that the applicant was therefore a workman.

The workman was assisted by his two sisters and by a hired boy. He paid each of the two sisters a small weekly sum by way of wages and (as to one of them) for dress, and they lived with him and received their board and lodging free. The judge has stated in his judgment that the workman admitted it was necessary to his earning his wages that he should disburse about 7*s.* a week in respect of the boy and has deducted that amount. I cannot find the express admission, but it may have been made in the course of the hearing, or the judge may have inferred it from the fact that the boy was hired. He has refused to make any deduction in respect

of the sisters. In their case there was no evidence of any admission, either express or to be inferred from other facts, that it was necessary to employ them. There is nothing beyond the statement that he was in fact assisted by them. I cannot say the judge was wrong in the course he took. I am not prepared to hold that the whole of the wages and other benefits received by the workman from his employer are not properly treated as the man's own earnings by reason only of the fact that he is assisted by members of his household and makes payments to them or on their account in respect of such assistance. It may I think be inferred from the nature of the employment as disclosed by the agreement that some help beyond that of the boy was necessary, but there was no bargain express or implied that he should employ the sisters, still less that he should pay them. I think in such a case the earnings are those of the head of the family none the less that he gives certain members of the family a share of them in return for their assistance, without which assistance he could not efficiently do the work. It is unnecessary to consider and I express no opinion on the question whether the deductions in respect of the boy were right.

Appeal dismissed.

Solicitors: *F. J. Berryman; Oppenheimer, Blandford & Co., for Andrews, Son & Huxtable, Dorchester.*

H. C. R.

C. A.
1915
June 9.

[IN THE COURT OF APPEAL.]

LANE *v.* W. LUSTY & SON.

Employer and Workman—Compensation—Accident arising out of and in the Course of the Employment—Direction by Employer to "go and find a job"—Extending Scope of Employment—Workmen's Compensation Act, 1906 (6 *Edw.* 7, *c.* 58), *s.* 1, *sub-s.* 1.

The workman, a boy of fourteen, was employed as a truck boy on a machine for cutting and making tops of packing cases, his duty being to push trucks of wood from the machine to the stack yard. He had nothing to do with the machine itself. Whilst waiting for a truck to be filled for him to move, one of his employers, seeing him apparently idle, told him to "go and find a job." He accordingly got a short stick and endeavoured to clear out the blower of the machine, which had become choked with chips, and in so doing slipped, and putting out his hand to save himself brought it in contact with the rotary saw of the machine and was seriously injured. On an application by him for compensation the county court judge held that the accident did not arise out of and in the course of the employment:—

Held, that the direction by the employer to "go and find a job" must be taken to have meant that the applicant was to do something which, although it was not within the scope of the employment, was boys' work and was not improper for him to do; that what the applicant did was within that direction; and accordingly that the accident arose out of and in the course of the employment.

Appeal from an award of the judge of the Bow County Court sitting as arbitrator under the Workmen's Compensation Act, 1906.

The applicant, a boy of fourteen, was employed by the respondents on a machine for cutting and making tops of packing cases. His duty was to take trucks of wood from the machine to the stack yard. He had nothing to do with the machine itself. On Saturday, February 6, 1915, one of the respondents, seeing the applicant unemployed, told him to make himself useful, which he did by sweeping up the floor and getting rid of the dust and chips caused by the machine. On the Monday following he was again unemployed, as there was then no truck ready for him to move, and another of the respondents saw him and called him a lazy sot and told him to "go and find a job." The applicant accordingly started to do work analogous to what he had done on the Saturday. He took a short stick and endeavoured to

clear out the blower of the machine, which had become choked with chips. In doing this he slipped on some shavings, and in putting out his hand to save himself brought it in contact with the rotary saw and was seriously injured.

The county court judge accepted the applicant's story, but held that the accident did not arise out of and in the course of the employment, and accordingly made an award in favour of the respondents.

The applicant appealed.

R. A. McCall, K.C., and *E. Abinger*, for the applicant. The county court judge was wrong in the inference he drew from the facts. The applicant honestly obeyed the direction given him by the employer to "go and find a job" and in doing what he did he believed he was acting in the interests of his employers. He cannot, therefore, be said to have acted outside the scope of his employment: *Harrison* v. *Whitaker Brothers* (1); *Tobin* v. *Hearn*. (2) The effect of the direction given by the employer was to enlarge temporarily the scope of the applicant's employment: *Geary* v. *F. Ginzler & Co.* (3) The work the applicant did was boys' work and was not work which it was improper for him to do. *Lowe* v. *Pearson* (4), upon which great reliance was placed by the county court judge, is distinguishable. There the boy was expressly forbidden to interfere with the machinery.

Harold Morris, for the respondents. Some limitation must be put upon the direction to "go and find a job." It was for the county court judge to decide what that limitation should be. There is here no evidence of any misdirection. The county court judge was, it is submitted, justified in coming to the conclusion he did, and there is no ground for disturbing his finding. The direction meant that the applicant was to make himself handy and did not mean that he was to interfere with dangerous machinery: *Davies* v. *Crown Perfumery Co.* (5) [He also referred to *Whitehead* v. *Reader*. (6)]

No reply was called for.

(1) (1899) 16 Times L. R. 108.
(2) [1910] 2 I. R. 639.
(3) (1913) 6 B. W. C. C. 72.
(4) [1899] 1 Q. B. 261.
(5) (1913) 6 B. W. C. C. 649.
(6) [1901] 2 K. B. 48.

C. A. 1915

LANE v. W. LUSTY & SON.

LORD COZENS-HARDY M.R. This is an appeal from the decision of a very learned and experienced county court judge from whom I never differ without great hesitation. It is a case where a lad of fourteen, shortly after he was engaged to work in a factory, got his fingers in contact with a rotary saw, with the result that he was seriously injured. The learned judge accepts the evidence of the boy on what is the material question before us, and the only question for us is whether, the facts being such as were found by him, they justify the inference he has drawn from them. The boy was employed on a machine for cutting and making tops of packing cases, and he had to manage the trucks which took the wood from the machine to the stack yard. He had nothing to do with the working of the machine itself. There were four men and two boys employed in connection with the running of it. On Saturday, February 6, one of the employers came and saw the boy idling; and when I say "idling" I do not mean it in the offensive sense, but that he was doing no work because there was none to do. He was told to make himself useful and he did that by engaging himself in sweeping up the floor and getting rid of dust and chips. No harm resulted from this, for it was quite free from danger. On the Monday, accepting the boy's statement as the learned county court judge did, he was again idle in the sense that there was no truck ready for him to move, and another of his employers, the brother of the man who had spoken to him on the Saturday, saw him and according to the boy's evidence called him a lazy sot and told him to "find a job." Some limitation must of course be put on those words. It would be quite impossible to say that they extended the sphere of his employment so as to give the boy authority to run a machine. The only question here is what limitation ought to be put on them and whether what the boy did was in excess of what was authorized by those words. The boy could not do something which was in the ordinary scope of his employment because the very point was that there was nothing for him to do in the way of his regular work. He was to do something else, and so he started doing something analogous to what he had done on the Saturday —not running the machine, not working the machine, but getting rid of the dust out of the blower. While doing this he slipped

and got his hand in a hole in circumstances which are rather obscure, but the hand went so far in and so high up that the circular saw reached it. In these circumstances is the learned judge right in the inference that he has drawn? After saying that he accepts the boy's story he continues: "I therefore assume that Mr. Lusty did tell the boy to find something to do."—I may point out that the actual words used were "find a job."—"I do not think, however, that this would justify him in taking a stick and cleaning out the machinery"; and he then proceeds to make an award in favour of the employers.

On the whole and accepting all the facts that the judge states, I think that when I come to interpret the words used by one of the employers on the Monday, as I have to do, they must be taken to have meant that the boy was to go and do something, although it might not be within the scope of his employment to do it. I do not mean that he might do any kind of work or work obviously dangerous, but he was to do something which was boys' work and was not obviously improper for him to do; and I think that what the boy did was within that authority. I come to the conclusion therefore, with great respect to the learned judge, that he misdirected himself as to the legal conclusion to be drawn from the facts as found by him, and that the case must therefore be remitted to him to determine the amount of compensation. The appeal must therefore be allowed.

PICKFORD L.J. I am of the same opinion. The applicant here describes his employment as follows: "I then became truck boy to a Linderman machine, a machine which fixes tops of packing cases together. I had to push the trucks away with the plank wood, then pile the planks. When planks not ready had to wait." That seems to have happened sometimes, and the employers seem to have had a strong objection to the boy's doing nothing. On the Saturday one of his employers came and asked him whether he had anything to do. The boy said that he had not and was told to go and help in cleaning up, it being the regular time to do so, and he says, "I swept the sawdust from the machine." Again on the Monday he was waiting for a truck to be filled when another of his employers came along and asked

C. A. 1915

LANE v. W. LUSTY & SON.

Pickford L.J.

him whether he had anything to do. He replied not for a minute, and then a truck being ready he went off with it. Then again at 11.30 he had nothing to do and was having his lunch and he was told to go and find a job. He says that thereupon he went to the clearing-up job he had done on the Saturday. I do not quite follow whether the learned judge intended to say that the direction to find a job meant that he was to find a job which was in the ordinary scope of his employment. If so I do not agree. The whole point was that he had no job in his own work and he had to find something else to do. I agree that there must be some limitation on this direction. I do not think that it gave him power to do anything that he liked, nor do I think, as I said in the course of the argument, it would have extended to allowing him to set the main engine going or to set in operation a complicated machine, but it would be authority for his doing anything which was reasonable work for a boy to do without special instructions. This sweeping up was work that boys did do, and the actual piece of work of clearing out the blower was a thing that was done by boys, though generally, no doubt, by the boys attached to the machine. Moreover it is not a thing requiring any great knowledge to do. What had happened was that the sawdust was not being carried away because the blower had got blocked, and the boy did not try to do anything towards working the machine, but took a stick and tried to get out the wood that was blocking it. It was work of a kind that a boy would naturally do, but ordinarily, as I have just said, it would be done by one of the boys attached to the machine. The respondents did not call any of the men or boys engaged on the machine to show what the machine was doing or whether the boy who ought to attend to this part of the machine was there. They elected to rely on the evidence given for the applicant on this point. The work then seems to me to be the sort of job to which the order to go and find some job would extend. He must be taken to have been told to go and do something outside his ordinary employment but something that would ordinarily be done by a boy like himself. If it was intended to limit the option of the employment further, the employer should have been more careful as to the order he gave.

If that be the right view, the employer's instructions would cover the work the boy tried to do, because as long as he did work which it was usual for a boy to do, he was doing something that was within the sphere of his employment for the time being. I think the learned judge has construed the order to find a job as meaning that he was to find work in the ordinary sphere of his employment, but in my opinion that is not the correct view. In accordance with the cases which have been decided it is competent to us to hold, as we do hold, that the instructions temporarily enlarged the sphere of the employment. It is not even as if the accident was due to the nature of the work which he undertook or that the work was in itself dangerous, but he had an accident and slipped, with the result that in putting out his hand it was caught by the machine.

For these reasons I agree that the appeal should be allowed and the case remitted to the county court judge for him to fix the amount of the compensation.

WARRINGTON L.J. I agree. The workman injured here was a boy whose ordinary work was pushing trucks of wood and stacking it. In that employment there came times when there was nothing to do. Upon the machine in connection with which the trucking was done other boys were employed, and one of the duties of these boys was to clear out, when necessary, a suction pipe which drew sawdust away in the course of the working of the machine. On Saturday, February 6, the hour had arrived for stopping the machine, as it was getting near closing time, and it then became the duty of all the hands to clear up. On that occasion the boy was found standing idle and one of the employers told him in terms to help in clearing up and he did so. This did not involve the clearing of the suction pipe. On the Monday there was a different state of things. There came a time when the boy had nothing to do in connection with trucking and piling the wood—which I will call his original employment—and was standing idle, and another of his employers came along and told him in somewhat forcible language to find a job. What in these circumstances was the boy to do? What in fact he did was to do a job which was

C. A. 1915

LANE v. W. LUSTY & SON.

Warrington L.J.

included in the work of one of the boys employed on the machine, that is, he proceeded to clear up, but extended the clearing up to the suction pipe. It seems to me that in so interpreting the order the boy was right. If the master tells the boy to find a job it is not for him to complain if the boy interprets the order as entitling him to do what one of the boys employed on the machine habitually did. It seems to me, with all respect to the learned county court judge, that he ought to have held on these facts that what the boy did was in the sphere of his employment.

Then it is argued that the county court judge has found as a fact that the boy was doing work outside the sphere of his employment when the accident happened, and that this Court cannot interfere with this finding. But it seems to me that the county court judge has really misdirected himself as to the inference to be drawn from the facts he has found. What he says is: "I find that even assuming the master had told the boy to get a job (and the boy's evidence on this point I am disposed to accept) this would not entitle the boy to clear out the suction pipe or blower, part of a complicated machine which four men and two boys were specially employed to work and attend to." He does not seem to me to have directed his mind to the real point whether the job the boy did was not a job such as the employer meant when he told him to get a job, but he seems to have thought that the boy was trying to interfere in some way with the mechanism of a complicated machine. It follows that I think that the learned judge has misdirected himself and that the case must be referred back to the county court judge to make an award of compensation.

Appeal allowed.

Solicitors: *Philbrick & Co.; Barlow, Barlow & Lyde.*

W. I. C.

McGREGOR *v.* TELFORD.

1915
June 21.

Bastardy—Jurisdiction of Justices—Previous Dismissal of Application—Effect of New Right of Appeal to Quarter Sessions—Res Judicata—Criminal Justice Administration Act, 1914 (4 & 5 *Geo.* 5, *c.* 58), *s.* 37, *sub-s.* 2.

Sect. 37, sub-s. 2, of the Criminal Justice Administration Act, 1914, which enables a woman to appeal to quarter sessions from a refusal by a Court of summary jurisdiction to make an order for the maintenance of her bastard child, confers an additional remedy upon her, and does not impliedly take away her previously existing right to renew her application to the Court of summary jurisdiction.

The decision in *Reg.* v. *Machen* (1849) 14 Q. B. 74, where it was held that a refusal by justices to make an order for the maintenance of a bastard, though on the merits, is no bar to a second application, was founded, not on the ground that no appeal by the woman lay to quarter sessions, but on the ground that the dismissal of her previous application was in the nature of a nonsuit in an action.

Reg. v. *Gaunt* (1867) L. R. 2 Q. B. 466; *Reg.* v. *Glynne* (1871) L. R. 7 Q. B. 16; and *Stokes* v. *Stokes* [1911] P. 195 considered.

Case stated by Durham justices.

On April 15, 1915, a complaint by Hilda Telford, a single woman (hereinafter called the respondent), that on November 11, 1914, she had been delivered of a bastard child of which she alleged Arnold McGregor (hereinafter called the appellant) was the father, was heard by the justices.

A similar complaint by the respondent against the appellant was heard by the same Court on March 11, 1915, and was dismissed on the ground of the insufficiency of the corroborative evidence in support of the respondent's case, and at the hearing on April 15, before the respondent's case was opened or any evidence was called, it was submitted by the appellant's solicitor that the respondent's complaint having been dismissed on March 11 the matter was res judicata, and that the justices had no right to rehear the case. In support of this contention the justices' attention was called to *Reg.* v. *Machen* (1), *Reg.* v. *Gaunt* (2), *Reg.* v. *Glynne* (3), and *Stokes* v. *Stokes* (4), in which

(1) 14 Q. B. 74.
(2) L. R. 2 Q. B. 466.
(3) L. R. 7 Q. B. 16.
(4) [1911] P. 195.

1915

McGREGOR v. TELFORD.

it was stated that the reason for allowing a rehearing in bastardy was that no appeal was given by the Bastardy Acts to a mother against the adverse decision of the justices; and it was contended that s. 37, sub-s. 2, of the Criminal Justice Administration Act, 1914, which came into operation on December 1, 1914, and provides that "An appeal shall lie to a Court of quarter sessions in manner provided by the Summary Jurisdiction Acts from any order made by a Court of summary jurisdiction under the enactments relating to bastardy, or from any refusal by a Court of summary jurisdiction to make such an order, or from the revocation, revival, or variation by a Court of summary jurisdiction of such an order," revoked by implication a mother's right of rehearing.

It was contended for the respondent that it could not have been intended to take away the mother's right of rehearing, as that would amount to a practical denial to her of justice, owing to the inability of complainants in general to bear the very much increased cost on an appeal to quarter sessions over a rehearing before justices. It was also contended that the right of appeal from a refusal to make an order in bastardy was an additional remedy given to a mother, and that her right of rehearing could only be taken away by express words.

The justices overruled the objection raised by the appellant, heard the complaint, made an order adjudging him to be the putative father of the child, and ordered him to pay a weekly sum for its maintenance and education.

The question for the opinion of the Court was whether the justices came to a correct determination in point of law.

G. Cecil Whiteley, for the appellant. Under the Bastardy Act, 1872, as under the previous Acts, the refusal by justices to make an order for the maintenance of a bastard, though on the merits, is no bar to a second application, or, indeed, to repeated applications provided they are made within twelve months of the birth of the child: *Reg.* v. *Machen.* (1) The ground of the decision in that case was that whereas the putative father had a right of appeal to quarter sessions, if an order was made against him,

(1) 14 Q. B. 74.

no appeal lay by the woman if her application was refused. The woman was thus in a less favoured position than the man. Now that the woman is given a right of appeal to quarter sessions by s. 37, sub-s. 2, of the Criminal Justice Administration Act, 1914, the reason for allowing her a rehearing of her application has gone.

[Scrutton J. Was not the decision in *Reg.* v. *Machen* (1) merely that the dismissal of the woman's application was in the nature of a nonsuit and that she could therefore make a fresh application?]

Lord Denman C.J. no doubt said that the dismissal of the application was in the nature of a nonsuit, but he pointed out that if no second application could be made by the woman, she and the man would be placed on an unequal footing. In *Reg.* v. *Gaunt* (2) Lush J. regarded the decision in *Reg.* v. *Machen* (1) as founded on the fact that no appeal was competent to the woman. In *Reg.* v. *Glynne* (3), where it was decided that if on an appeal to quarter sessions an affiliation order was quashed, on the ground of the insufficiency of the corroborative evidence, the order of quarter sessions was a decision on the merits and was final so that fresh proceedings could not be taken before justices, Lush J. again pointed out that where the justices decline to make an order, the woman cannot appeal to quarter sessions against their decision, "and therefore this Court has held that she is at liberty to apply again to the petty sessions, and to produce other evidence before them." In *Stokes* v. *Stokes* (4), where the question was as to the right of a married woman, whose summons under the Summary Jurisdiction (Married Women) Act, 1895, has been heard and dismissed, to obtain an order on a second summons founded on the same cause of complaint, the President (Sir Samuel Evans) said (5): "The analogy of the right of a mother to make repeated applications (within the limited time) for an order in bastardy was relied upon. The reason, however, for this right is that no appeal is given by the Bastardy Acts to a mother against an adverse

(1) 14 Q. B. 74.
(2) L. R. 2 Q. B. 466.
(3) L. R. 7 Q. B. 16.
(4) [1911] P. 195.
(5) Ibid. at p. 197.

1915

McGREGOR v. TELFORD.

decision by the justices." These observations establish that the reason why the woman was allowed to make repeated applications was because she had no right of appeal, and as that reason has now ceased she can no longer make more than one application to the justices.

W. H. Gingell, for the respondent, was not called upon.

LORD READING C.J. In this case the point, which has been very neatly put by Mr. Whiteley, is whether s. 37, sub-s. 2, of the Criminal Justice Administration Act, 1914, which gives a right of appeal to quarter sessions to the woman in bastardy applications, has taken away her right to proceed with an application for a rehearing, notwithstanding that a previous application by her had been dismissed. The argument for the appellant is that the foundation of the decisions that the woman was entitled to a rehearing is because no appeal lay by her to quarter sessions when the decision was adverse to her, whereas an appeal was given to the man when the decision was against him. It is said that that being so, and the Legislature having now conferred upon the woman the same right of appeal as hitherto was given only to the man, the reason for allowing her a rehearing has ceased to exist, and consequently the sub-section in question must be taken to have altered the law. If we were satisfied that the justices' jurisdiction to rehear applications within twelve months under the Bastardy Acts was founded upon the fact that Parliament had not given a right of appeal to the woman whereas it had given it to the man, there might possibly be a great deal to be said for Mr. Whiteley's argument, but an examination of *Reg.* v. *Machen* (1), which is the foundation of all this discussion, establishes no such proposition as is put forward by Mr. Whiteley, although it is right to say that some judges have stated as the reason why the woman was entitled to a rehearing that she had no right of appeal. The true reason for the decision in *Reg.* v. *Machen* (1) was that, inasmuch as the woman failed in her application because of the lack of sufficient corroborative evidence, there was no decision against her except in the sense that her application failed, and as the

(1) 14 Q. B. 74.

1915

McGREGOR v. TELFORD.

Lord Reading C.J.

Court held that that was in the nature of a nonsuit it did not disentitle her from applying again. It is true that in *Reg.* v. *Machen* (1) Lord Denman C.J. said, "if we were to hold that no second application could be made, the parties would be placed on unequal terms," but he did not go on to say, "because we think they are on unequal terms, therefore we give the woman the right to a rehearing in order to correct the error of Parliament." He was only pointing out why on sound principles of law they should come to a conclusion in the woman's favour; and later in his judgment he said that the justices' "dismissal of the application is rather in the nature of a nonsuit in an action; in which case the plaintiff may come again better prepared." That seems to be based upon sound principles of law as applied to the case before him, and notwithstanding certain observations of Lush J. in *Reg.* v. *Gaunt* (2) which seem to question the soundness of the decision in *Reg.* v. *Machen* (1), the decision in *Reg.* v. *Gaunt* (2) in no way qualified *Reg.* v. *Machen* (1), nor did the two later cases of *Reg.* v. *Glynne* (3) and *Stokes* v. *Stokes* (4) qualify it. It is quite true that in *Stokes* v. *Stokes* (4) the President apparently assumed that *Reg.* v. *Machen* (1) was based upon the ground that as no appeal had been given to the woman the Court allowed her a rehearing in order to put her and the man in an equal position; but I am satisfied that that was not the ground of the decision in *Reg.* v. *Machen.* (1) That case only decided that an application by a woman under the Bastardy Acts if dismissed was in the nature of a nonsuit which did not preclude a rehearing. Further, it seems to me that Parliament in dealing with this question in 1914 must be assumed to have known the existing state of the law, and when by s. 37, sub-s. 2, it gave a right of appeal to the woman without saying that her right to a rehearing was abolished, it must be taken to have intended that the sub-section should operate in her favour as an additional remedy. If the appellant's argument were to prevail the consequence would be that as soon as the woman gave notice of appeal within seven days and the matter came before quarter sessions there would be an end of her application, and although

(1) 14 Q. B. 74.
(2) L. R. 2 Q. B. 466.
(3) L. R. 7 Q. B. 16.
(4) [1911] P. 195.

1915

McGREGOR v. TELFORD.

Lord Reading C.J.

she might thereafter find sufficient material to support her application, she could not then proceed by way of rehearing because the matter would have been disposed of finally. I cannot come to the conclusion that Parliament in enacting s. 37, sub-s. 2, ever intended such a result. I say nothing as to the effect of an appeal to quarter sessions under the sub-section, as that is not before us, but I am clearly of opinion that there is nothing in the sub-section which takes away the woman's existing right to a rehearing. The appeal must be dismissed.

RIDLEY and SCRUTTON JJ. concurred.

Appeal dismissed.

Solicitors for appellant: *King, Wigg & Brightman, for F. J. Lambert, Gateshead.*

Solicitor for respondent: *H. Wynn Parry, Gateshead.*

J. S. H.

1915

May 19, 20.

WILLIAMS *v.* MOSS' EMPIRES, LIMITED.

Contract—Writing—Rescission or Variation—Subsequent Parol Agreement—Evidence—Admissibility.

By a contract in writing which was not to be performed within a year from the making thereof the plaintiff was engaged by the defendants to perform at their theatres on certain terms including the payment of salary at a specified rate. During the currency of the contract and within less than a year of its termination the parties verbally agreed to a variation of the plaintiff's salary for a part of the remainder of the engagement. Subsequently the plaintiff sued the defendants to recover salary earned since the verbal agreement, at the rate specified in the original contract:—

Held, that the verbal agreement, being one which was to be performed within a year, and, therefore, not within the Statute of Frauds, was admissible in evidence to prove that the parties had substituted for the original contract a new contract embodying the variation as to salary and the unaltered terms of the original contract.

Vezey v. *Rashleigh* [1904] 1 Ch. 634 considered.

APPEAL of the defendants from a judgment of the deputy judge of the Westminster County Court.

1915

WILLIAMS v. MOSS' EMPIRES, LIMITED.

The plaintiff was a music hall artist. The defendants were the proprietors of a number of variety theatres. On July 31, 1911, the plaintiff and the defendants entered into an agreement in writing by which the plaintiff agreed to perform at the defendants' theatres in accordance with the terms of the agreement at a specified salary per week for a period of about three and a half years expiring in March, 1915. In consequence of the outbreak of the war negotiations took place in August, 1914, during the currency of the plaintiff's agreement with the defendants, between a body called the Variety Artistes Federation and a number of theatre proprietors, including the defendants, which resulted in the adoption of a scheme the material term of which was that, for twelve weeks commencing August 17, 1914, 50 per cent. of the gross receipts of the music halls should be divided amongst the artists in proportion to the salaries payable to them under their then existing agreements, and that the sum thus ascertained and paid should be accepted by the artists in lieu of the salary payable under existing agreements. The plaintiff was not a member of the federation and had not given it any authority to act for him, but on August 14, 1914, the defendants sent to the plaintiff and others a circular letter announcing their intention of putting the federation scheme into operation at their theatres. The plaintiff on August 22 and subsequent dates was paid sums in respect of salary calculated according to the scheme, but eventually the plaintiff, alleging that he had not accepted and was not bound by the scheme, brought this action, in which he claimed the difference between the amount received by him from the defendants for salary on and since August 22 and the sum which he would have received if he had been paid salary in accordance with the agreement of July 31, 1911.

The deputy judge found as a fact on the evidence that the plaintiff had verbally agreed to accept payment of salary in accordance with the scheme, but he held that the effect of so doing was to vary, and not to put an end to, the agreement of July 31, 1911, and that as the original agreement was one which was by s. 4 of the Statute of Frauds required to be in writing, variation of that written agreement could not be proved by a

1915

WILLIAMS v. MOSS' EMPIRES, LIMITED.

subsequent verbal agreement. The deputy judge, therefore, gave judgment for the plaintiff for the amount claimed.

The defendants appealed.

Storry Deans, for the defendants. The deputy county court judge has found as a fact that the plaintiff agreed to the scheme under which, instead of a weekly salary of fixed amount, he was to receive a salary of uncertain amount based on the weekly takings of the theatre in which he was performing. It is incorrect to speak of this arrangement as a mere variation of the original contract. It was a new contract, the terms of which were the same as those of the original contract except as to salary. The new contract was not a contract which was not to be performed within a year, because at the date when it was made less than a year of the period of the engagement remained unexpired, and therefore it was not within the Statute of Frauds. That being so, it was enforceable, although not in writing, and could be given in evidence in answer to a claim under the old contract. The distinction drawn by the deputy county court judge as regards parol contracts between the variation and the rescission of a written contract is without foundation. "After the agreement has been reduced into writing, it is competent to the parties, at any time before breach of it, by a new contract not in writing, either altogether to waive, dissolve, or annul the former agreement, or in any manner to add to, or subtract from, or vary or qualify the terms of it, and thus to make a new contract; which is to be proved, partly by the written agreement, and partly by the subsequent verbal terms engrafted upon what will be thus left of the written agreement": *Goss* v. *Lord Nugent*, per Lord Denman C.J. (1) It is only where the new contract itself is, looked at in its entirety, one which is required by the Statute of Frauds to be in writing that it cannot, if parol, be relied on as varying the original contract: *Giraud* v. *Richmond* (2); *Noble* v. *Ward*. (3) A very slight variation in the terms of an existing contract, such as the postponement of delivery of goods for a few days, operates as the making of a new contract: *Stead* v. *Dawber*. (4) [He also

(1) (1833) 5 B. & Ad. 58, at p. 65.
(2) (1846) 2 C. B. 835.
(3) (1867) L. R. 2 Ex. 135.
(4) (1839) 10 Ad. & E. 57.

referred to *Marshall* v. *Lynn* (1); *Stowell* v. *Robinson* (2); *Sanderson* v. *Graves* (3); *Doe* d. *Egremont* v. *Courtenay* (4); *Doe* d. *Biddulph* v. *Poole*. (5)]

Julian Fuller (*Frampton* with him), for the plaintiff. In the most recent case on this subject, *Vezey* v. *Rashleigh* (6), Byrne J., referring to *Price* v. *Dyer* (7) and *Robinson* v. *Page* (8), said that those decisions showed that although to prove rescission of a written contract parol evidence of a subsequent agreement is admissible, parol evidence of an agreement to vary the terms of the contract cannot be admitted. The question, therefore, is what was the intention of the parties? Did they intend to rescind the original contract and to make a new one, or merely to vary the original contract by substituting a different method of calculating the salary? That, as Lord Denman C.J. said in *Stead* v. *Dawber* (9), is a question of fact, and the deputy county court judge has found as a fact that what the parties did was not to put an end to the original contract, but merely to vary it. On that finding of fact, the judge rightly gave judgment for the plaintiff.

SHEARMAN J. In this case we have to deal with an ancient principle of law which has been given effect to in a variety of cases. The point is an important one because the law on this subject has been stated in the cases and text-books in two somewhat different ways. The material facts are that on July 31, 1911, the plaintiff entered into a contract with the defendants to perform at their theatres. The contract was in writing and contained a large number of terms, by one of which the engagement of the plaintiff by the defendants was to continue for a period of about three and a half years, terminating in March, 1915. It was therefore a contract which by the Statute of Frauds was required to be in writing. In August, 1914, when less than twelve months was left of the period during which the contract was to continue, certain events occurred in consequence

(1) (1840) 6 M. & W. 109.
(2) (1837) 3 Bing. N. C. 928.
(3) (1875) L. R. 10 Ex. 234.
(4) (1848) 11 Q. B. 702.
(5) (1848) 11 Q. B. 713.
(6) [1904] 1 Ch. 634.
(7) (1810) 17 Ves. 356.
(8) (1826) 3 Russ. 114.
(9) 10 Ad. & E. 57.

1915

WILLIAMS v. MOSS' EMPIRES, LIMITED.

Shearman J.

of which the parties, as the county court judge has found, entered into a new verbal agreement by which all the terms of the original contract were to remain in force except as to the amount of salary. The new agreement provided for the plaintiff's salary to be calculated on a different basis from that provided for by the original contract. The plaintiff was subsequently minded to claim to be paid salary at the rate originally provided for, and he brought this action to recover the difference between the amount of salary which he had received since the making of the new agreement and that which he would have received under the original contract. The defence to the action was that the plaintiff was bound by the new agreement.

The county court judge gave judgment for the plaintiff on the ground that, although the plaintiff had entered into this new verbal agreement, it could not be acted on, by reason of the principle which has been laid down in some of the cases that evidence is not admissible to prove a parol variation of a contract which is required to be in writing. No doubt there are dicta in some of the cases, and notably in the most recent case, *Vezey* v. *Rashleigh* (1), which support the view of the county court judge that he was bound to disregard the parol contract and to treat the original contract as still subsisting; but in support of the appeal it is contended that the statement of the law in *Vezey* v. *Rashleigh* (1) is inadequate rather than incorrect, and it is said that the real principle is that which was laid down in *Goss* v. *Lord Nugent* (2) and *Noble* v. *Ward* (3) and other cases. In my judgment the principle was more correctly and adequately stated in those cases than in *Vezey* v. *Rashleigh* (1), and it is this, that where the agreement, varying an agreement which would be invalid if it were not in writing, is itself of such a character that it is bound to be in writing, then unless it is in writing it cannot be relied on to vary or rescind the original contract and must be disregarded. The principle as laid down by Willes J., who delivered the judgment of the Court, in *Noble* v. *Ward* (3) is where there is alleged to have been a variation of a written contract by a new parol contract, which

(1) [1904] 1 Ch. 634.

(2) 5 B. & Ad. 58.

(3) L. R. 2 Ex. 135.

incorporates some of the terms of the old contract, the new contract must be looked at in its entirety, and if the terms of the new contract when thus considered are such that by reason of the Statute of Frauds it cannot be given in evidence unless in writing, then being an unenforceable contract it cannot operate to effect a variation of the original contract. That principle is to be found in a number of cases, which I need not refer to in detail, beginning with *Goss* v. *Lord Nugent* (1), and followed by *Stead* v. *Dawber* (2), *Giraud* v. *Richmond* (3), *Marshall* v. *Lynn* (4), and *Stowell* v. *Robinson.* (5) Those cases show that whenever the parties vary a material term of an existing contract they are in effect entering into a new contract, the terms of which must be looked at in their entirety, and if the new contract is one which is required to be in writing but is not in writing, then it must be wholly disregarded and the parties are relegated to their rights under the original contract. But if on the other hand there is nothing in the terms of the new contract which necessitates a written contract, then, although the original contract was one which was bound to be in writing, the new parol contract can be enforced because although it is not in writing it is nevertheless an effective contract. In the present case it was competent for the parties in August, 1914, to enter into a new verbal contract to vary the terms of the original contract which would expire in March, 1915, and which, therefore, in August, 1914, had less than a year to run. The new contract does not fall within any of the provisions of the Statute of Frauds and therefore need not be in writing. It is a binding and enforceable contract, and, in my opinion, affords a defence to the plaintiff's claim in this action. The appeal must therefore be allowed.

SANKEY J. I agree. I think some confusion has arisen from the use of the words "variation of a contract." The result of varying the terms of an existing contract is to produce, not the original contract with a variation, but a new and different

(1) 5 B. & Ad. 58.
(2) 10 Ad. & E. 57.
(3) 2 C. B. 835.
(4) 6 M. & W. 109.
(5) 3 Bing. N. C. 928.

1915

WILLIAMS v. MOSS' EMPIRES, LIMITED.

Sankey J.

contract. The rule of law applicable to the question arising in this case may, in my opinion, be stated as follows: A contract which in compliance with the Statute of Frauds is in writing may be rescinded by a new agreement. The new agreement may be one which in order to be enforceable is required to be in writing, or it may be one which is valid though it is not in writing. If it is one which is required to be in writing and is not in writing, it is unenforceable and cannot be treated as evidence that the original contract has been rescinded, and the original contract, therefore, remains in force. But if the new agreement is in writing, or, if verbal, is one which need not be in writing, the new agreement is valid and the original contract is rescinded.

In the present case the new agreement was verbal; its terms did not require it to be in writing; and, therefore, it rescinded the original contract. In my opinion the defendants are entitled to judgment, and the appeal must be allowed.

Appeal allowed.

Solicitors for plaintiff: *Sterns.*
Solicitor for defendants: *R. M. Dix.*

F. O. R.

WHITE *v.* ST. MARYLEBONE BOROUGH COUNCIL.

1915
May 12.

Local Government—Houses deemed to be unfit for Human Habitation—Back-to-back Houses—Two-thirds of Space at Back of Houses contiguous—Remaining One-third of Space occupied by Air Shaft—Closing Order—Housing, Town Planning, &c., Act, 1909 (9 *Edw.* 7, *c.* 44), *s.* 17, *sub-s.* 2; *ss.* 39 *and* 43.

By s. 17, sub-ss. 1, 2, and 3, of the Housing, Town Planning, &c., Act, 1909, if any dwelling-house appears to the local authority to be in a state so dangerous or injurious to health as to be unfit for human habitation, it is their duty to make a closing order, and any owner aggrieved by the order may appeal to the Local Government Board.

By s. 43 "it shall not be lawful to erect any back-to-back houses intended to be used as dwellings for the working classes, and any such house commenced to be erected after the passing of this Act shall be deemed to be unfit for human habitation . . . ."

Ten dwelling-houses were respectively erected over ten private motor garages. Each dwelling-house was designed for occupation with the garage beneath it and was occupied by a chauffeur employed by the tenant of the garage and dwelling-house. Each dwelling-house could only be approached from the corresponding garage underneath, the approach being by a separate staircase. Five of the dwelling-houses with their corresponding garages faced in one direction and had to the extent of two-thirds common backs respectively with the remaining five dwelling-houses and garages which faced in the opposite direction, the remaining one-third of the space at the back of each pair of houses being occupied by a ventilating shaft. The local authority having made closing orders in respect of the dwelling-houses on the ground that they were "back-to-back houses intended to be used as dwellings for the working classes" within the meaning of s. 43 of the Act, the owner appealed to the Local Government Board :—

Held, on a case stated by the Board under s. 39, sub-s. 1 (*a*), of the Act for the opinion of the High Court, (1.) that the existence of the air shafts did not in point of law prevent the houses from being back-to-back houses within the meaning of the statute; (2) that it was for the Local Government Board to determine as a matter of fact whether the houses were back-to-back houses; (3) that a chauffeur is a member of the working classes in the ordinary and popular sense, and that as a matter of law it was open to the Local Government Board to determine whether as a matter of fact the houses were "intended to be used as dwellings for the working classes" within the meaning of s. 43 of the Act.

CASE stated by the Local Government Board, under s. 39, sub-s. 1 (*a*), of the Housing, Town Planning, &c., Act, 1909. (1)

(1) By the Housing, Town Planning, &c., Act, 1909 (9 Edw. 7, c. 44), s. 17, sub-ss. 1 and 2, if any dwelling-house appears to the local

1915

WHITE v. ST. MARYLEBONE BOROUGH COUNCIL.

Since the date of the appeal the appellant had died, and probate of his will and codicils was granted to his executors, Frederick White and others.

By an indenture of lease dated October 4, 1913, a plot of land upon which certain dwelling-houses the subject of this appeal had been erected was demised by Viscount Portman to the appellant for a term of fifty years from December 25, 1912, in consideration of the appellant having rebuilt the messuages, garages, and premises therein described at the rents thereby reserved and subject to the covenants and conditions therein contained. The lease contained (amongst other stipulations) a covenant on the part of the lessee not to use or permit to be used the demised premises or any part thereof otherwise than as private garages without the consent of the lessor.

Prior to the grant of the lease the appellant had pulled down certain buildings which were standing upon the land and had erected a new building of which the dwelling-houses formed part upon the site thus cleared.

The new building was completed by the end of the month of June, 1913, and the district surveyor on or about September 12, 1913, certified it as having been constructed in all respects in conformity with the London Building Act, 1894 (57 & 58 Vict. c. ccxiii.).

The new building consisted of one entire block of two floors

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authority to be in a state so dangerous or injurious to health as to be unfit for human habitation, it is "their duty to make an order prohibiting the use of the dwelling-house for human habitation (in this Act referred to as a closing order) until in the judgment of the local authority the dwelling-house is rendered fit for that purpose."

By sub-s. 3 any owner aggrieved by the order may appeal to the Local Government Board.

By s. 39, sub-s. 1 (*a*), "the Local Government Board may . . . . state in the form of a special case for the opinion of the" High Court "any question of law arising in the course of the appeal."

Sect. 43: "Notwithstanding anything in any local Act or byelaw in force in any borough or district, it shall not be lawful to erect any back-to-back houses intended to be used as dwellings for the working classes, and any such house commenced to be erected after the passing of this Act shall be deemed to be unfit for human habitation for the purposes of the provisions of the Housing Acts."

divided by four transverse party walls into five separate premises. On the ground floor the premises were divided into and constructed for use as ten private motor garages arranged in five pairs. The garages in each pair of garages were divided the one from the other by a half-brick partition in which there was a door which was fastened up. Ten dwelling-houses had been erected on and formed the first floor of the new building over the garages and were arranged and divided into five pairs corresponding to the garages below them. Each of the dwelling-houses comprised three living rooms, a bath room, and a water closet. The dwelling-houses in each pair of dwelling-houses were separated one from the other partly by a partition about three inches thick made of lath and plaster which was not carried up above the roof, and partly by a ventilating shaft or area. Each of the back rooms in each pair of dwelling-houses had a window opening into the ventilating shaft or area. There were five shafts or areas, and the general measurement of each shaft or area was 5 feet by 6 feet 2 inches, though some were slightly larger. There was no party wall within the meaning of that expression as defined in s. 5, sub-s. 16, of the London Building Act, 1894, between the dwelling-houses constituting each pair of dwelling-houses respectively. Each of the dwelling-houses could only be approached from the corresponding garage underneath, the approach being by a separate staircase, and each dwelling-house was designed for occupation with the garage beneath it.

Each of the garages with the corresponding dwelling-house over it had been sub-let by the appellant to various tenants at a uniform rent of 60*l.* for various terms of years as private motor garages.

On December 31, 1913, closing orders under the provisions of sub-s. 2 of s. 17 of the Housing, Town Planning, &c., Act, 1909, were made by the respondents, the St. Marylebone Borough Council, in respect of each of the dwelling-houses on the ground that they were back-to-back houses intended to be used as dwellings for the working classes within the meaning of s. 43 of the Act.

The appellant appealed to the Local Government Board against the closing orders.

1915

WHITE v. ST. MARYLEBONE BOROUGH COUNCIL.

On the hearing of the appeal it was contended for the appellant:

(1.) That the dwelling-houses were not back-to-back houses within the meaning of s. 43 of the Housing, Town Planning, &c., Act, 1909, having regard to their method of construction.

(2.) That the dwelling-houses were not intended to be used as dwellings for the working classes within the meaning of the section, having regard to the fact that they were used as dwelling-houses in connection with private motor garages by private servants only of the sub-lessees of the garages. In support of this contention reference was made to *London County Council* v. *Davis* (1), *Crow* v. *Davis* (2), and *Crow* v. *Davis* (No. 2). (3)

For the respondents it was contended:

(1.) That the dwelling-houses were back-to-back houses having regard to their method of construction. In support of this contention reference was made to *Murrayfield Real Estate Co.* v. *Edinburgh Magistrates.* (4)

(2.) That the dwelling-houses were intended to be and were being used as dwelling-houses for the working classes on the ground that the occupying tenants were persons working for wages under an employer by manual labour. In support of this contention reference was made to the definition in paragraph 12 (*e*) of the schedule to the Housing of the Working Classes Act, 1903 (5), and to *In re Drax.* (6)

It was admitted by counsel for the respondents that each of the dwelling-houses was so far as practicable properly ventilated, lighted, and drained, and apart from the provisions of s. 43 of the Act of 1909 was fit for human habitation.

The Board gave no decision on the appeal, and for the purpose of giving their decision submitted the following questions for the opinion of the Court:—

1. Are the dwelling-houses or any of them back-to-back

(1) (1897) 77 L. T. 693.
(2) (1903) 89 L. T. 407.
(3) (1904) 91 L. T. 88.
(4) (1911) 49 Sc. L. R. 148.
(5) By the schedule to the Housing of the Working Classes Act, 1903 (3 Edw. 7, c. 39), paragraph 12 (*e*), "The expression 'working class' includes mechanics, artisans, labourers, and others working for wages."
(6) (1887) 57 L. T. 475.

houses within the meaning of s. 43 of the Housing, Town Planning, &c., Act, 1909, having regard to the method of their construction?

2. Are the dwelling-houses or any of them intended to be used as dwelling-houses for the working classes within the meaning of the above-mentioned section?

Greer, K.C., and *A. H. Bodkin*, for the appellant. These dwellings are not back-to-back houses within the meaning of s. 43 of the Housing, Town Planning, &c., Act, 1909. There is no party wall between two houses. It is a mere lath and plaster wall. There have been a series of statutes dealing with the subject of dwelling-houses for the working classes, e.g., the Labouring Classes Lodging-Houses Act, 1851 (14 & 15 Vict. c. 34), the Labouring Classes Dwelling Houses Act, 1866 (29 & 30 Vict. c. 28), the Artizans and Labourers Dwellings Act, 1868 (31 & 32 Vict. c. 130), the Artizans Dwellings Act, 1882 (45 & 46 Vict. c. 54), the Housing of the Working Classes Act, 1885 (48 & 49 Vict. c. 72), the Housing of the Working Classes Act, 1890 (53 & 54 Vict. c. 70), the Housing of the Working Classes Act, 1900 (63 & 64 Vict. c. 59), and the Housing of the Working Classes Act, 1903 (3 Edw. 7, c. 39). In the titles to those statutes the expressions used are "labourers," "artizans," and "working classes." There is no definition of "working class" except one contained in the schedule to the Housing of the Working Classes Act, 1903, paragraph 12 (*c*), by which the expression "includes mechanics, artisans, labourers, and others working for wages."

"Back-to-back houses" are those which are built with nothing between the whole of the back of one and the whole of the back of the other so that there cannot be ventilation from the back to the front of the houses. The object of the legislation is to secure in a limited degree healthy conditions for the working classes. In the present case each room has a fireplace and windows and admittedly they have sufficient light and air. There is a through current of air. By "back-to-back houses" is meant houses through which there can be no current of air. In the present case the houses have an air space between them.

1915

WHITE v. ST. MARYLEBONE BOROUGH COUNCIL.

The expression "back-to-back houses" is used in the popular and general sense: *Murrayfield Real Estate Co.* v. *Edinburgh Magistrates.* (1) Therefore if there is a substantial part of the back of one which does not impinge on the back of the other the houses are not back-to-back houses. As a matter of law the Local Government Board cannot upon the facts stated in the case find that these houses are "back-to-back houses."

These houses were not "intended to be used as dwellings for the working classes" within the meaning of s. 43 of the Housing, Town Planning, &c., Act, 1909. The tenants are not the chauffeurs but their employers. The Legislature did not intend to include houses under the control of the employer. The test is, what is the class who go to live in the houses? The chauffeurs only go from day to day by the licence of their employers and by virtue of their service. The object of the Act of 1909 is to protect persons who do not as a rule obtain adequate accommodation for themselves and their families: *London County Council* v. *Davis.* (2) In the case of chauffeurs there is no likelihood of overcrowding. They are often men of intelligence, superior to the working class. The statute is aimed at preventing promiscuous occupation by the working classes, not at the occupation by a special class like chauffeurs. In *Crow* v. *Davis* (3) the judges did not dissent from the view of Channell J. in *London County Council* v. *Davis* (2), although they had the opportunity of doing so. [*Crow* v. *Davis* (No. 2) (4) was also referred to.]

Macmorran, K.C., and *S. G. Turner*, for the respondents. Dwellings are "back-to-back houses" if they are in contiguity at their backs. In order that they may not be "back-to-back houses" there must be substantially no contact at the back. In the north of England particularly it had become possible under local Acts to erect "back-to-back houses," and the Legislature by s. 43 of the Housing, Town Planning, &c., Act, 1909, aimed at an absolute prohibition of houses so built notwithstanding any Act or by-laws. In the present case the houses would undoubtedly be "back-to-back houses" if it were not for the air shaft.

(1) 49 Sc. L. R. 148.
(2) 77 L. T. 693.
(3) 89 L. T. 407.
(4) 91 L. T. 88.

But the air shaft is only one-third of the width of the building. Therefore as to two-thirds of the houses they are undoubtedly back to back. The mere presence of the air shaft does not prevent the houses being "back-to-back houses." If houses are in immediate contiguity to any substantial degree at the back they are "back-to-back houses." It would be a very serious limitation of an important statute if it had to be determined in each case whether or not the provision of an air shaft made them "back-to-back houses."

A chauffeur is a member of the working classes. He is within the definition contained in clause 12 (*c*) of the schedule to the Housing of the Working Classes Act, 1903. But apart from that definition he is clearly a person belonging to the working classes.

Greer, K.C., replied.

LORD READING C.J. This is a case stated by the Local Government Board under s. 39 of the Housing, Town Planning, &c., Act, 1909, upon questions of law which have arisen in the course of an appeal which came before the Local Government Board under that statute. The facts so far as material are that it was proposed to erect buildings which were to serve on the ground floor as garages for motor cars and on the upper floor as dwelling-houses. The case states that there were altogether ten of these dwelling-houses and garages built. In each of these buildings there was a motor garage facing one way, a motor garage facing the other way, on the upper floor there was a dwelling-house facing one way and a dwelling-house facing the other way, and there was one back which I may call a common back to these two houses each facing in an opposite direction. There was also an opening which has been perhaps conveniently called, though I am not quite sure that it is accurate, an air shaft in the upper floor with an outlet to the roof, and which therefore gave air to the premises on the first floor which were the premises used as a dwelling-house, and there were windows from the rooms in the dwelling-house on each side, that is to say, dwelling-houses facing each way. The question for us is whether in these circumstances a pair of

1915

WHITE v. ST. MARYLEBONE BOROUGH COUNCIL.

Lord Reading C.J.

dwelling-houses so built constitutes "back-to-back houses." The question put to us is: "Are the dwelling-houses or any of them back-to-back houses within the meaning of s. 43 of the Housing, Town Planning, &c., Act, 1909, having regard to the method of their construction?" Now, I am not quite sure that that question accurately represents what was intended by the Local Government Board, but I have no doubt whatever as to the intention of the Local Government Board. What the question really means is whether upon the facts stated by them it was as a matter of law open to the Local Government Board to conclude that these dwelling-houses are "back-to-back houses." Sect. 43 of the Act of 1909 prohibits the erection of "back-to-back houses" intended to be used as dwellings for the working classes. The object of the section was to provide that with regard to any dwelling-houses to be erected in future—that is after the passing of the Act—no houses should be built back to back if it was intended that they should be used by the working classes, and what Parliament had in mind, as appears quite clearly from the language of the section and having regard to the whole scope of the Act, was to ensure that there should be proper ventilation in the houses of the working classes, and the means that the Legislature adopted for this purpose was to enact that they should not be built back to back. Now in the present case there is no doubt on the statement of the facts that two-thirds of the back of each pair of these houses was back to back, that is to say that there was a common back as regards two-thirds to the two houses, and as regards one-third which was occupied by their air shaft the houses were not back to back, and the question therefore resolves itself into this: Where it is shown that two-thirds of the space at the back of a house is back to back and one-third is not, is it open to the Local Government Board to conclude that the dwelling-houses so constructed are "back-to-back houses"? In my opinion it is open to the Local Government Board to come to that conclusion. I do not mean for one moment to decide the question of fact; that is for the Local Government Board to decide upon the evidence before them; but, as a matter of law, it certainly is open to them to come to that conclusion if they think fit. Equally is it open to

them if they think fit to say that these are not "back-to-back houses" upon the view that one-third of the space is open in the sense which I have described. The real test is whether substantially these houses so constructed are "back-to-back houses." The question of fact is not for us to decide, and therefore I express no opinion upon it, and content myself by saying that as a matter of law it is open to the Local Government Board to come to that conclusion if they think upon the facts that substantially these houses are "back-to-back houses."

The second question raised is whether these are houses "intended to be used as dwellings for the working classes" within the meaning of s. 43 of the Act of 1909. It may be that, stated in that form, that also is a question of fact. As a matter of law, I have no doubt, upon the facts as stated in the case, that the Local Government Board can come to the conclusion that they are intended to be used as dwellings for the working classes within the meaning of the section. A chauffeur, the driver of a motor car whose employment is that of driving a motor car, is, in my opinion, a member of the working classes, applying the ordinary test and interpreting the words "working classes" in the ordinary and popular sense. These buildings were intended to be used for motor car drivers. They, therefore, were intended to be used by members of the working classes. They were, in my judgment, as a matter of law capable of being "intended to be used as dwellings for the working classes" within the meaning of the section, and upon the facts as stated it is, in my opinion, clearly open to the Local Government Board to conclude as a matter of fact that they were intended to be used as dwellings for the working classes within the meaning of the section. Therefore the answer to both the questions, in the sense in which I have interpreted them, is in the affirmative.

AVORY J. I am of the same opinion. The only way in which this question can be turned into a question of law is to ask whether the existence of the air shafts as described in the case prevents these houses, in point of law, from being back-to-back houses. In my opinion, as a question of law, the existence of such air shafts as these is not inconsistent with their being

1915

WHITE v. ST. MARYLEBONE BOROUGH COUNCIL.

back-to-back houses within the meaning of the statute, and I agree that the Local Government Board must decide as a question of fact whether they are.

LOW J. I agree.

Judgment for the respondents.

Solicitors for appellant: *Lithgow & Pepper.*
Solicitors for respondents: *Sharpe, Pritchard & Co.*

J. E. A.

1915

June 16, 17.

BLAKEY, APPELLANT *v.* HARRISON, RESPONDENT.

Licensed Premises—Sale or Consumption of Intoxicating Liquor—Suspension—Gratuitous Supply to Friends of Licensee—Offence—Intoxicating Liquor (Temporary Restriction) Act, 1914 (4 *&* 5 *Geo.* 5, *c.* 77), *s.* 1—*Order of Licensing Justices.*

By s. 1, sub-s. 1, of the Intoxicating Liquor (Temporary Restriction) Act, 1914, licensing justices may by order direct that the sale or consumption of intoxicating liquor on licensed premises shall be suspended during such hours as may be specified in the order; and under sub-s. 2 if any person acts in contravention of an order under this section he is guilty of an offence.

An order of licensing justices directed that the sale or consumption of intoxicating liquor on licensed premises should be suspended on Sundays between 2.30 P.M. and 6 P.M., except in the case of bona fide residents in hotels.

At 4 P.M. on a Sunday beer was supplied gratuitously by the respondent, the landlord of licensed premises, to three men who were his personal friends and who drank the beer on the premises:—

Held, that the Act and order did not apply to a case where a licensee was entertaining his personal friends, and that the respondent had not acted in contravention of the order.

CASE stated by the stipendiary magistrate for Leeds.

On February 21, 1915, an information was laid by James Blakey, the appellant, against the respondent, for that he then being the holder of a justices' licence for the sale of intoxicating liquors by retail on certain premises known by the sign of the Half Way House Inn, Leeds, did unlawfully act in contravention of an order by the licensing justices for the city of Leeds made on February 5, 1915, in pursuance of the Intoxicating Liquor

(Temporary Restriction) Act, 1914 (1), and approved by His Majesty's Secretary of State and then in force in the said city, in that he allowed the consumption of certain intoxicating liquor, to wit, beer, on his said licensed premises at the hour of 4 P.M. on Sunday, February 21.

The information was heard on March 25 and the magistrate dismissed it and ordered the appellant to pay to the respondent five guineas costs.

At the hearing of the information the following facts were admitted.

(1.) On February 5, 1915, in pursuance of the Intoxicating Liquor (Temporary Restriction) Act, 1914, an order was made by the licensing justices for Leeds and approved by the Secretary of State upon the recommendation of the chief officer of police, which ordered inter alia that:

"The sale or consumption of intoxicating liquor on the premises of all persons holding any retailer's licence for the sale of intoxicating liquor in the said city, and the supply or consumption of intoxicating liquor in all registered clubs in the said city, shall be suspended while this order is in operation . . . . between half-past two o'clock in the afternoon and six o'clock in the evening on Sundays. The above suspension of the sale, supply, or consumption of intoxicating liquor shall not apply in any case to bona fide residents in hotels or registered clubs, supplied

(1) Intoxicating Liquor (Temporary Restriction) Act, 1914 (4 & 5 Geo. 5, c. 77), s. 1:

"(1.) The licensing justices for any licensing district may, if they think fit, upon the recommendation of the chief officer of police that it is desirable for the maintenance of order or the suppression of drunkenness in any area, by order direct that the sale or consumption of intoxicating liquor on the premises of any persons holding any retailers' licence in the area, and the supply or consumption of intoxicating liquor in any registered club in the area, shall be suspended while the order is in operation, during such hours and subject to such conditions or exceptions (if any) as may be specified in the order:

"Provided that, if any such order suspends the sale, supply, or consumption of intoxicating liquor at an hour earlier than nine at night, the order shall not have effect until approved by the Secretary of State.

"(2.) If any person acts in contravention of, or fails to comply with, any order under this section he shall be liable on conviction in respect of each offence to a fine not exceeding fifty pounds . . . ."

1915

BLAKEY v. HARRISON.

in the hotels or clubs in which they reside; nor to railway refreshment rooms with respect to passengers arriving or departing by train."

(2.) On Sunday, February 21, two police officers visited the Half Way House Inn, of which premises the respondent was the licensee, at 4 P.M., the premises being then duly closed according to law. The police officers entered by a side door into the bar, where they found the respondent and three other men; opposite the three men was a table with three glasses partly full of beer. In reply to the constable who asked them what they were doing, one of them said "We have come from Shipley to see Sam Harrison" (the respondent's brother), "but he has gone fishing. Harry" (the respondent) "has asked us in to have a drink. We did not pay for it." To this statement the others agreed.

It was contended on behalf of the appellant that an offence had been committed under these circumstances within s. 1 of the Act, and that the making of the order under this section suspending the consumption of intoxicating liquor between the hours of 2.30 P.M. and 6 P.M. on Sundays effected, subject to the above-mentioned exception, an absolute prohibition against the consumption of such liquor on licensed premises under any circumstances whatsoever within those hours, and that the fact that the premises were then duly closed to the public and that the licensee was bona fide entertaining his own friends at his own expense was immaterial.

The magistrate was of opinion that the words "consumption shall be suspended," although in themselves wide enough to cover such a case, could not on a reasonable construction of the statute and having regard to its expressed objects be held applicable where licensed premises were in fact closed to the public and were being used as a private residence by the licensee. The attention of the magistrate was called upon this point to the principle of the decision in *Lester* v. *Torrens*. (1)

The magistrate was further of opinion that the wider construction was not necessary for the true interpretation of the statute, which seemed to be directed inter alia to cases of

(1) (1877) 2 Q. B. D. 403.

consumption (apart from sale) on licensed premises while still lawfully open for other purposes than the sale of intoxicating liquor, and that, being penal in character and creating, as was suggested, a new offence, the section should be construed strictly.

The magistrate therefore dismissed the information as above stated.

The question for the opinion of the Court was whether upon the above facts the magistrate came to a correct determination and decision in point of law.

Bairstow, K.C. (*Waddy* with him), for the appellant. If the language of s. 1 of the Intoxicating Liquor (Temporary Restriction) Act, 1914, and of the order of the licensing justices is given its ordinary and natural meaning, and there is no reason why it should be given any other meaning, the respondent has on the admitted facts been guilty of a contravention of the order, for beer was consumed on his premises at a time when the order required the consumption to be suspended. The Act is not dealing with closing time, but is intended to restrict the consumption of intoxicating liquor. It is therefore beside the question to consider whether the liquor has been paid for by the person consuming it or whether it has been given to him. In either case there is a consumption of liquor.

[SCRUTTON J. Would it be a contravention of this order if the landlord or his wife drank a glass of beer on the premises between 2.30 P.M. and 6 P.M. on a Sunday?]

Yes, unless the premises were an hotel, in which case the landlord and his family would come within the exception in favour of bona fide residents in hotels. The only exceptions to the operation of the order are those expressly mentioned, namely, residents in hotels and clubs and travellers by railway. As regards all other persons the prohibition is absolute. Sect. 61 of the Licensing (Consolidation) Act, 1910, expressly permits the supply of liquor during closing time to the landlord's friends at his expense. In the absence of any similar provision in this Act or order the respondent should have been convicted. [*Young* v. *Gentle* (1) was referred to.]

(1) [1915] 2 K. B. 661.

1915

BLAKEY v. HARRISON.

A. Neilson, for the respondent. The information charges the respondent with allowing the consumption of intoxicating liquor at 4 P.M. on a Sunday. That is not an offence under the Act of 1914. Sect. 1, sub-s. 2, of the Act makes it an offence to act in contravention of, or to fail to comply with, an order of licensing justices made under the Act. This order provides that at certain times the sale or consumption of intoxicating liquor shall be suspended. It is therefore an offence to sell or to consume during the time of suspension; but it is not an offence to allow some one else to consume. Under s. 61 of the Act of 1910 it is an offence for a licensee to allow intoxicating liquor to be consumed on the premises during closing time. There is no similar provision in the Act of 1914.

On the facts of this case the magistrate rightly dismissed the information. The words "consumption" or "consumed" are to be found in several sections of the Act of 1910 and the words are always used in connection with the sale of liquor: see ss. 61, 66, 67, 68, 85. The only section which deals with the supply of liquor on licensed premises otherwise than by sale is s. 78, which prohibits the supply of liquor to constables on duty "whether by way of gift or sale." The word consumption in the Act of 1914 should be given the same meaning as it has borne all through the Licensing Acts: *Ex parte Campbell.* (1) The reason why the order of the licensing justices contains no express exemption covering this case is that, apart from s. 61 of the Act of 1910, it has always been recognized that the landlord of licensed premises may entertain his own personal friends during closing time: *Overton* v. *Hunter* (2); and it would be unreasonable so to construe this order as to make that an offence which has never hitherto been one.

Bairstow, K.C., in reply. The person who is to suspend the sale or consumption is the licensee; if he allows it to go on, he does not suspend it and is guilty of a contravention of the order. The Act of 1910 is not incorporated into the Act of 1914 and the language of the earlier Act is no guide to the meaning of the word "consumption" in the later Act; but there is no authority

(1) (1870) L. R. 5 Ch. 703, at p. 706. (2) (1860) 1 L. T. 366.

that that word in the Act of 1910 is confined to cases of consumption after sale. Although the word "consumption" is not used in s. 78, that section affords an instance of supply by way of gift being an offence.

LORD READING C.J. This case raises an interesting and difficult question under the Intoxicating Liquor (Temporary Restriction) Act, 1914, one of the emergency statutes passed in consequence of the war, and intended to enable additional restrictions to be placed on the sale or consumption of intoxicating liquor. [The Lord Chief Justice read s. 1 of the Act and the order of the Leeds licensing justices and stated the facts as set out in the case, and continued:] The question is whether the consumption of beer on the respondent's premises by persons who were his guests constitutes an offence by the respondent under this Act and order. It has been strenuously argued on behalf of the appellant that the words "sale or consumption" are sufficiently wide to cover the present case, and I agree that if the words are given their ordinary and natural meaning that is so; but although that may be the natural meaning of the language and although the ordinary rule of construction is to give the language of an enactment its natural meaning, yet if we come to the conclusion that the ordinary and natural meaning of the words produces a result so unreasonable that Parliament can never have intended it we are not bound to adopt that meaning and we are entitled to give the words a more limited interpretation if it be possible to do so. It seems to me that the real test to apply to this case is to consider whether the landlord of licensed premises or any member of his family who drank a glass of beer on the premises on a Sunday between 2.30 P.M. and 6 P.M. would be guilty of a contravention of this order. In the literal sense that would be a consumption during the period of suspension, but having regard to the scope of the existing licensing laws on which this emergency legislation has been engrafted, it would be unreasonable in my opinion to hold that a landlord would in the circumstances I have mentioned be guilty of an offence against this order. It is impossible in this connection to draw any distinction between the consumption o

1915

BLAKEY v. HARRISON.

Lord Reading C.J.

intoxicating liquor by the landlord himself or his family and consumption by his friends who are being entertained on the licensed premises at his expense; and if it is no offence for the landlord to drink his own intoxicating liquor at a time when the sale or consumption is suspended under the order, it is very difficult to hold that the landlord is guilty of an offence if the consumption is by his friends. In my opinion, therefore, we cannot give the strict meaning to the word consumption; it must be read in a limited sense. The difficulty is to say to what extent the sense is to be limited. A guide to the proper construction to be placed on the word is, I think, to be found in the Licensing (Consolidation) Act, 1910, several sections of which deal with the consumption of intoxicating liquor, and, with one exception, it is always in connection with the sale of liquor. Sect. 78, which does not contain the actual word "consumption," prohibits the "supply" of liquor to a constable on duty, and that section contains the words "whether by way of gift or sale"; but all through the Act of 1910, wherever the words "consumed" or "consumption" occur, they are always used with reference to and in conjunction with the sale of liquor. It is true that in the Act of 1914 the word "supply" also occurs, but it is used only in connection with clubs, and the reason for that probably is that the word sale is not an apt word to use with regard to the distribution of liquor in a club.

In my opinion the Act of 1914 was intended to deal with the consumption of liquor on licensed premises which has been purchased on those premises. If the liquor is purchased before the time fixed for the suspension of sale or consumption and is consumed afterwards an offence would undoubtedly be committed, and the reason for introducing the word consumption was probably to meet a case of that sort. Another reason for the use of the word is that it is only consumption on licensed premises that is to be suspended; if liquor purchased before the time for suspension is consumed afterwards off the premises, that would not involve a contravention of an order made under s. 1 of the Act. Bearing in mind that this is a penal Act, the wiser course in my view is to hold that the word consumption does not apply to a case like the present one.

1915

BLAKEY v. HARRISON.

Lord Reading C.J.

It is said that our decision may open the door to evasions of the Act. It seems to me that that could only happen in exceptional cases, for the strength of this case is that the respondent was acting entirely bona fide and without any intention to evade the order by a colourable transaction. Reliance was also placed by the appellant on the express exemption in the order in the case of bona fide residents in hotels and clubs ; but to my mind that exception confirms the view that the word consumption was never intended to apply to consumption by the landlord himself, for it is very difficult to understand why, if a bona fide resident in an hotel is permitted to consume and even to purchase liquor in the hotel during the hours of suspension, the landlord should commit an offence if he does that which is permitted to a person residing in the landlord's own house.

For these reasons I am of opinion that the decision of the magistrate was right and that this appeal must be dismissed.

RIDLEY J. I do not propose to differ from the conclusion at which my Lord and my brother Scrutton have arrived, but I must confess that during the argument my mind has to a great extent tended the other way. The contention of the respondent is that the Act of 1914 and the order of the licensing justices must be read with the Licensing Acts, and that the words sale and consumption must be given the same meaning as they bear in those Acts. It is true that in the Licensing Acts, and more particularly in the Licensing (Consolidation) Act, 1910, consumption usually means consumption following after a sale, and that since the decision in *Overton* v. *Hunter* (1) the giving of liquor to friends of the licensee during closing hours is not an offence. But it seems to me with great submission that the words " sale or consumption " as used in the Act of 1914 are not words of art, and have no reference to the same words as used in the Licensing Acts. The actual words " sale or consumption " are to be found in only one section of the Act of 1910, namely, s. 85, and that is not a section creating the offences, but merely dealing with the evidence by which they are to be proved. It is therefore open to argument that the words in the Act of 1914 must be read in

(1) 1 L. T. 366.

1915

BLAKEY v. HARRISON.

Ridley J.

their ordinary and natural meaning, and if so they would cover the consumption of liquor which has not been purchased by the person consuming it. The only exceptions in the order are the supply of liquor to bona fide residents in hotels and clubs, and to travellers by railway. In the present case the persons who were consuming the beer were not residents in an hotel and were therefore prima facie within the language of the prohibition. The rule of construction which I always endeavour to follow is to take the words of an enactment as they are and not to give them a meaning which they do not naturally bear in order to avoid the supposed consequences which would follow from giving them their natural meaning. But although I feel some doubt as to the reasons which have led the Lord Chief Justice to come to the conclusion that the decision of the magistrate was right, I am sure that my doubts must be ill-founded and I do not propose to differ from that conclusion.

With regard to the point that the respondent was charged with allowing the consumption of intoxicating liquor, which it is said is not an offence under the Act or order, I think a conviction in the terms of the summons could be upheld, because a licensee who does not suspend the consumption of intoxicating liquor on his premises must be taken to allow it.

SCRUTTON J. I agree with the judgment of the Lord Chief Justice.

Appeal dismissed.

Solicitors for appellant: *King, Wigg & Brightman, for Sir Robert Fox, Leeds.*

Solicitors for respondent: *Nicholls, Herbert & Co., for Arthur Willey, Leeds.*

F. O. R.

OUNSWORTH (Surveyor of Taxes) *v.* VICKERS, LIMITED.

1915
June 25.

Revenue—Income Tax—Deductions—Capital or Income Expenditure—Expense of dredging and constructing Deep Water Berth—Income Tax Act, 1842 (5 & 6 *Vict. c.* 35), *s.* 100, *Sched. D, First Case, rr.* 1 *and* 3; *First and Second Cases, r.* 1.

The respondents' shipbuilding and engineering works at Barrow-in-Furness were approached by a channel which was open to all shipping and which it was the duty of the harbour authority to maintain. Subsequent to the respondents commencing business there in 1896 the harbour authority so neglected the maintenance of the channel that it began to silt up, and by gradual accretions it became much narrower and shallower so that it was no longer possible for vessels which could with safety get from and into the respondents' works in 1896 to continue to do so. A complete restoration of the channel to its original condition would have cost about 300,000*l.*, which sum the harbour authority found it impossible to provide in order to perform their admitted obligation, whereupon the respondents and the harbour authority agreed to complete a lesser and cheaper scheme which would make the channel sufficiently navigable. This involved the dredging of the channel to a depth of 2 ft. 6 in. instead of the 9 ft. at low water at which it was in 1896, and to make this practicable a deep water berth was placed at some distance from the bar to enable vessels to rest there and cross the bar at high water on the following tide. This work, which was carried out in 1912, was paid for by the respondents and the harbour authority, and the latter undertook its future maintenance. If this expenditure had not been incurred it would have been impossible for the respondents to deliver a British battle cruiser then near completion at their works, and the expenditure enabled the respondents to earn the profits upon which they were assessed to income tax. The respondents claimed to deduct the amount expended by them in respect of the dredging and the construction of the deep water berth from their gross profits before ascertaining their taxable profits for 1912 under the Income Tax Acts:—

Held, that the expenditure was capital expenditure, and therefore that the respondents were not entitled to deduct it from their gross profits before ascertaining their taxable profits.

Case stated by Income Tax Commissioners.

At meetings of the Commissioners for General Purposes of the Income Tax Acts held at Ulverston, Lancashire, on November 5 and December 18, 1913, Vickers, Limited (hereinafter called the respondents), appealed against an assessment made upon them

1915

OUNSWORTH v. VICKERS, LIMITED.

for the year ending April 5, 1914, under Sched. D of the Income Tax Acts in respect of the profits from their business of shipbuilders and engineers.

The respondents claimed to deduct from their gross profits for 1912 a sum of 97,431*l.* before ascertaining the profits for 1912, which were to be used in calculating the average for three years upon which the respondents were chargeable for the year ending April 5, 1914. The respondents, in their books, had placed the amount 97,431*l.* to a suspense account, purposing to deal with it over a period of years, but it was agreed between the parties that the whole sum should be dealt with on the year of expenditure, 1912.

The Commissioners found the following facts:—

The respondents were a firm of shipbuilders and engineers at Barrow-in-Furness, where they began business on July 1, 1896. The water ingress to and egress from their works was by a channel open to all shipping running from Piel (a distance of some four miles) to their works.

The Furness Railway Company were the harbour authority and as such had all statutory powers for dredging, buoying, and maintaining the channel which was exclusively within their jurisdiction.

In 1896 (when the respondents purchased the works and began business there) the channel was of a width of 300 ft. and of a minimum depth of 9 ft. at low water; it was admitted that it was the duty of the harbour authority to keep the channel clear at this width and depth.

Subsequent to the respondents beginning operations it was found that the harbour authority so neglected maintaining the channel that it began to silt up and by accretions from time to time had become much narrower and shallower until it arrived at such a condition that it was becoming no longer possible for such vessels as could with safety get from and into the respondents' works in 1896 to continue to do so. Lengthy negotiations took place between the respondents and the harbour authority. The latter, while admitting their liability to maintain the channel in its original condition, found themselves for certain reasons unable to perform their admitted obligation.

An estimate was made of the cost of restoring the channel to its original condition. The estimate was 300,000*l.*, or thereabouts, which sum the harbour authority found it impossible to provide, whereupon the respondents and the harbour authority agreed to complete a lesser and cheaper scheme which would make the channel sufficiently navigable, but which would not necessitate the expenditure of the larger sum for the complete restoration of the channel to its condition of 1896.

The agreement between the parties was for dredging the channel to a depth of 2 ft. 6 in. instead of the 9 ft. at which it was in 1896, and to make this practicable a deep water berth was placed at some distance from the bar which would enable vessels to rest there and cross the bar at high water on the following tide, thereby obviating the necessity of dredging the whole depth of 9 ft. This work was carried out in 1912 and paid for by the respondents and the harbour authority, the respondents' contribution being the said sum of 97,431*l.* and the contribution of the harbour authority 35,000*l.* The work done was only a partial restoration of the waterway to its original condition in 1896, with the exception of a widening of the channel at the bar from 300 ft. to 600 ft. and at a depth of 2 ft. 6 in. done by the respondents at a cost of 7000*l.* It was estimated that a complete restoration of the waterway would have cost 300,000*l.* The harbour authority undertook its future maintenance.

If this expenditure had not been incurred it would have been impossible for the appellants to deliver the battle cruiser *Princess Royal* then completing construction at the port of Barrow. The expenditure enabled them to earn the profits upon which they were assessed to income tax.

The Commissioners were of opinion that 90,431*l.* of the above expenditure was towards a partial restoration of the channel to the condition in which it was in 1896, and that such expenditure was made by the respondents in the course of and solely for the purposes of their business and was essentially necessary to enable them to earn the profits upon which they were assessed to the income tax and without which they could not have earned any such profits, but that the expenditure of 7000*l.* in widening

1915

OUNSWORTH v. VICKERS, LIMITED.

the channel at the bar was an improvement and as such was not an allowable deduction, whereupon the surveyor of taxes expressed his dissatisfaction at the determination of the Commissioners in respect of the said sum of 90,431*l.* as being erroneous in point of law, and duly required the Commissioners to state this case for the opinion of the High Court.

Sir F. E. Smith, S.-G., W. Finlay, K.C., and *T. H. Parr* (for *Raymond Asquith*, now serving with His Majesty's Forces), for the Crown. The whole of the expenditure in question was capital expenditure and therefore cannot be deducted by the respondents in order to arrive at their taxable profits. A rough test as to what is capital expenditure and what is revenue expenditure was laid down thus by the Lord President (Lord Dunedin) in *Vallambrosa Rubber Co.* v. *Inland Revenue* (1): "capital expenditure is a thing that is going to be spent once and for all, and income expenditure is a thing that is going to recur every year." Applying that test it is clear that the expenditure now sought to be deducted is capital expenditure. The deep water berth was an entirely new work and was not the mere restoration of the channel; and with regard to the expenditure on dredging it would have been unnecessary if the Furness Railway Company, as the harbour authority, had not neglected their duty. In consequence of that neglect the construction of a new channel by dredging became necessary. It is no answer for the respondents to say that the expenditure was incurred by them in order to earn their profits; all expenditure, even that which is admittedly capital expenditure, is incurred with that object. The work constituted a permanent improvement, and the expenditure was not "wholly and exclusively laid out or expended for the purposes of such trade" within the meaning of r. 1 of the first and second cases in Sched. D, s. 100, of the Income Tax Act, 1842. In this respect the finding of the Commissioners is wholly unsupported by the evidence. The reasoning in *Moore & Co.* v. *Inland Revenue* (2) is directly applicable in this case. There certain coalmasters, having failed to obtain satisfactory railway facilities from the only railway company owning lines in

(1) 1910 S. C. 519; 5 Tax Cases, 529. (2) 1915 S. C. 91.

their district, promoted two parliamentary Bills for authority to construct a line to serve the coalfield. The Bills were opposed by the railway company, and upon that company giving a parliamentary obligation to provide the facilities required by the promoters the Bills were by consent thrown out. In estimating their profits for income tax purposes the coalmasters sought to deduct the expenses incurred by them in connection with the promotion of the Bills, but it was held that those expenses could not be deducted. In his judgment the Lord President (Lord Strathclyde) said the expenditure was capital expenditure "because the money was used to buy for the traders, including the appellants, a better and cheaper access to their customers, and it was, therefore, in my opinion, just as much capital expenditure as if it had been spent in constructing a fresh line of railway for the purpose of reaching their customers and disposing more conveniently and more cheaply to themselves of their coal. . . . . Now, this 360*l.* spent on buying for the appellants an access to their customers is certainly a sum which was spent once for all and is not a thing that is going to recur every year, and therefore it appears to me that . . . . the sum of 360*l.* in question here is singularly clearly an item of capital expenditure and not an expenditure out of revenue." [They also referred to *Granite Supply Association* v. *Inland Revenue.* (1)]

Foote, K.C., and *A. M. Latter*, for the respondents. The respondents are entitled to deduct the expenditure in question in order to arrive at the amount of their taxable profits. First as to dredging: the expense of dredging is in its nature a recurring expense. Adopting the test suggested by Lord Dunedin in *Vallambrosa Rubber Co.* v. *Inland Revenue* (2), we say that just as in that case the expense of weeding those portions of the rubber estate where the trees had not yet reached the rubber bearing age was said to be an income expenditure because it occurred every year, the cost of dredging is similarly an annually occurring expense. Dredging should really be done day by day. It is therefore income expenditure, and it does not cease to be so because the actual work is done not day by day or even year by

(1) (1905) 8 F. 55; 5 Tax Cases, 168.

(2) 1910 S. C. 519; 5 Tax Cases, 529.

1915

OUNSWORTH v. VICKERS, LIMITED.

year, but every two or three years. The dredging was undertaken solely to get the *Princess Royal* out, and the fact that it may have a future benefit to the respondents has no bearing upon this question. Nor does it affect the question that the legal liability to dredge the channel rested upon the Furness Railway Company when in fact the expenditure was incurred by the respondents: see *Usher's Wiltshire Brewery* v. *Bruce.* (1) The case of *In re King's Lynn Harbour Moorings Commissioners* (2), where it was held that the Harbour Moorings Commissioners were entitled to a deduction for revenue applied under Act of Parliament for repayment of money expended in the renewal of works, is in point on this question. As to the case of *Moore & Co.* v. *Inland Revenue* (3), cited for the Crown, the point there was really unarguable, the cost of promoting a Bill for a new railway being clearly not an income expenditure.

As to the deep water berth: it is said on behalf of the Crown that it was a new work and therefore that it was a capital expenditure; but a new work may be constructed solely for the purposes of the year's contracts. The test is what was the dominant or primary purpose for which the expense was incurred. In this case it follows from the Commissioners' finding that the deep water berth was made in order to get the *Princess Royal* out. The cost of the deep water berth having been thus incurred for the purposes of the business of the year is an income expenditure just as would have been the cost of, say, erecting a special windlass to haul a vessel out. The expense may be deducted none the less because the berth may be beneficial for the purposes of the respondents' business in subsequent years. The berth was constructed as an equivalent of deeper dredging and the expense is precisely on the same footing as the expense of dredging.

The Commissioners' findings are findings of fact and cannot be disturbed unless there was no evidence to support them. There was abundant evidence to support those findings. [They cited *Smith* v. *Lion Brewery Co.* (4)]

W. Finlay, K.C., in reply. There is nothing in the case to establish that the expenditure in question was incurred

(1) [1915] A. C. 433.
(2) (1875) 1 Tax Cases, 23.
(3) 1915 S. C. 91.
(4) [1911] A. C. 150.

solely in order to get the *Princess Royal* out. The expenditure was incurred for the purposes of the respondents' business generally. The respondents seek to divide the expenditure into two heads, first in respect of the dredging, and secondly in respect of the deep water berth, but the scheme was one and undivided. It was a new work and the expenditure on it was capital expenditure. Suppose a manufacturer has a large contract in hand and thinks it worth while to add to his factory; he carries this out in one year, his motive in doing so being his desire to deal with the contract he has in hand. The cost of adding to his factory is none the less a capital expenditure although his motive in incurring it may have been to carry out the particular contract. That is precisely the position in this case.

ROWLATT J. In this case, which arises upon very special facts, I think that the Crown is entitled to succeed. The question is whether the sum of 90,431*l.* sought to be deducted by the respondents was an income expenditure or a capital expenditure. Both sides have referred me to the following observations used by the Lord President in *Vallambrosa Rubber Co.* v. *Inland Revenue* (1): "I do not say that this consideration is absolutely final or determinative, but in a rough way I think it is not a bad criterion of what is capital expenditure—as against what is income expenditure—to say that capital expenditure is a thing that is going to be spent once and for all, and income expenditure is a thing that is going to recur every year." I take it, and indeed both sides agree, that no stress is there laid upon the words "every year": the real test is between expenditure which is made to meet a continuous demand, as opposed to an expenditure which is made once for all. Mr. Foote was, I think, right in saying that, assuming that dredging the channel is income expenditure if the respondents dredged year by year, it is none the less income expenditure because the dredging was not done for a year or two because it was not worth while to do so and was only done when it was seriously required to get rid of the mischief which had been growing all the time and which,

(1) 1910 S. C. 519; 5 Tax Cases, 529.

1915

OUNSWORTH v. VICKERS, LIMITED.

Rowlatt J.

theoretically, ought to have been kept down coincidently with its growth. Mr. Foote contended that, so far as the dredging of the channel was concerned, what was actually done was on the same footing as dredging actually done in the year, that is, that the respondents did in a single year dredging which they ought to have spread over a series of years, and therefore that the expenditure was income expenditure which as a matter of fact has been defrayed in one year although it ought to have been spread over several years. As regards the construction of the deep water berth, Mr. Foote contended that the expenditure was incurred in order to get out the particular ship, the *Princess Royal*. He argued that expenditure might be income expenditure although the work on which it was incurred endured beyond the year. I do not differ from that altogether, but it seems to me that the question must always be one of fact whether particular expenditure can be put against particular work, or whether it is to be regarded as enduring expenditure and serving the business as a whole. A person may install valuable machinery because he has a particularly big contract on hand, and he may very well do so because he desires to enlarge his resources for the purpose of dealing with that particular contract and for similar contracts he hopes will follow—to deal in short with a business of greater scope. Therefore it must be a question of fact in all such cases.

I now desire to examine the findings in this case. The respondents did not own the bed of this channel, nor did they own the site of the deep water berth. The only interest they had in the channel was that of every other subject, namely, the right to navigate it. The harbour authority—the Furness Railway Company—was charged by law with the duty of keeping the channel dredged, and, so far as this case appears, dredged to a minimum depth of 9 ft. at low water, and a width of 300 ft., that being the depth and width in 1896 when the respondents began business there. The agreement under which the work was done was made in 1911, and the history of the matter is thus dealt with in the case: "Subsequent to the respondents beginning operations it was found that the harbour authority so neglected maintaining the channel that it began to silt up and by

accretions from time to time had become much narrower and shallower until it arrived at such a condition that it was becoming no longer possible for such vessels as could with safety get from and into the respondents' works in 1896 to continue to do so." That is stated with reference to such vessels as could with safety get to the respondents' yard in 1896; there was no question of the *Princess Royal* there. The channel was in such a condition that the general business as it was in 1896 could no longer be carried on. The case then proceeds: "Lengthy negotiations took place between the respondents and the harbour authority. The latter, while admitting their liability to maintain the channel in its original condition, found themselves for certain reasons unable to perform their admitted obligation. An estimate was made of the cost of restoring the channel to its original condition. The estimate was 300,000*l.*, or thereabouts, which sum the harbour authority found it impossible to provide, whereupon the respondents and the harbour authority agreed to complete a lesser and cheaper scheme which would make the channel sufficiently navigable, but which would not necessitate the expenditure of the larger sum for the complete restoration of the channel to its condition in 1896."

Clearly it was not a case of the respondents saying to themselves "We must get out the *Princess Royal* and must dredge the channel or do anything else that may be necessary." It was a matter which affected the respondents' business generally. Later in the case it is stated that if this expenditure had not been incurred it would have been impossible for the respondents to deliver the *Princess Royal*, and that it enabled them to earn the profits upon which they were assessed to income tax. That is not conclusive. I have no doubt that this expenditure and a great deal more was necessary to enable the respondents to deliver the *Princess Royal* or any other ship in order to earn their profits, but that does not carry the matter any further. I cannot believe that it was intended to find that this expenditure was incurred simply in order to get out the *Princess Royal*.

I come now to the question whether this can be regarded as expenditure on dredging done in one year but an accumulated expenditure. It was not the respondents' business to do this

1915

OUNSWORTH v. VICKERS, LIMITED.

Rowlatt J.

dredging. That, however, is not conclusive of the matter. If they chose to do it for their own business for the year the Commissioners might well have found that it was a proper deduction; but the duty was on the Furness Railway Company, who for a great many years had neglected its performance. The channel got worse and worse, and then the respondents had to face the situation. After lengthy negotiations they, as I understand it, did this: they did not simply put right the default of the harbour authority; they entered into an agreement by which a new thing was done. They did not dredge only to enable their ships to get out merely by virtue of the dredging; they adopted a different plan, namely, by constructing a deep water berth in which their ships could lie between the two tides, and therefore it seems to me that being placed in a difficulty they said to themselves "While we cannot get rid of this difficulty we shall create a new state of things to get round it." The position is just the same as if they had found that there was some new way by which they could get to the sea by digging a new channel at an insignificant expense. I think the true view of the facts in this case is that the whole of this expenditure by the respondents was incurred in making what was in fact a new means of access from their works to the sea, and that it was therefore not income expenditure but capital expenditure, and cannot therefore be deducted. The appeal must be allowed.

Appeal allowed.

Solicitor for appellant: *Solicitor of Inland Revenue.*
Solicitors for respondents: *Surtees, Phillpotts & Co.*

J. S. H.

RECHER & CO. *v.* NORTH BRITISH AND MERCANTILE INSURANCE COMPANY.

1915
June 14.

Insurance (Fire)—Consequential Loss—Assessment of Loss by Insured's Auditor — Arbitration — Evidence — Auditor as Witness — Cross-examination — Conclusiveness of Assessment.

By a policy of insurance against fire on business premises an insurance company agreed to pay to the insured in the event of damage by fire to their property on account of annual net profit an agreed percentage on the amount by which the turnover in each month after the fire should in consequence of the fire be less than the turnover for the corresponding month of the year preceding the fire. The policy further provided that the amount of all losses under the policy should be assessed by the insured's auditors. During the currency of the policy property of the insured was damaged by fire. The auditors gave certificates stating the difference between the turnover for the months after and the corresponding months in the year before the fire, and the percentage payable. An arbitration was held to determine the amount payable under the policy. The auditors' certificates were put in evidence and a member of the firm of auditors was called as a witness by the insured and stated that when he gave the certificates he was satisfied that the losses of turnover stated therein were in fact sustained in consequence of the fire:—

Held, that the assessments of the auditor were conclusive evidence of the amount of the loss recoverable under the policy unless it were shown that the auditor had misdirected himself in point of law or had omitted to take into consideration some material fact; and that the auditor might be cross-examined, and the insurance company might call direct evidence, to show that the auditor had omitted to take into consideration the fact that the losses of turnover were wholly or in part due to other causes than the fire, but not to show that the auditor's conclusions of fact were erroneous.

Special Case for the opinion of the Court pursuant to s. 19 of the Arbitration Act, 1889.

By a policy of insurance issued by the respondents, the North British and Mercantile Insurance Company, to the claimants, Messrs. Recher & Co., hair manufacturers, of Bradford, the respondents agreed with the claimants (inter alia), "subject to the terms and conditions printed on the back hereof or otherwise expressed hereon which are to be taken as part of this policy, that if at any time after payment of the premium . . . . the premises or property of the insured

1915

RECHER & Co. v. NORTH BRITISH AND MERCANTILE INSURANCE COMPANY.

therein shall be damaged or destroyed by fire, ... and the business shall be thereby interfered with or interrupted, the corporation will pay to the insured monthly at the end of each calendar month after the date of the fire until such time as reduction in turnover in consequence of the fire shall have ceased but not exceeding in all nine calendar months on account of annual net profit and charges as hereinafter set forth, the same percentage on the amount by which the turnover in each such month shall in consequence of the fire be less than the turnover for the corresponding month of the year preceding the fire as the sum or sums hereby insured shall bear to the total of the turnover for the last financial year."

The policy further provided that "the amount of all losses under this policy shall be assessed by the insured's auditors, Messrs. F. H. Lee & Greaves, of Bradford, whom failing by a firm of chartered accountants to be mutually appointed by the corporation and the insured."

Condition 9 printed upon the back of the policy provided for the reference to arbitration in manner therein specified of "all differences arising out of this policy."

It was admitted by the respondents that the premises and the property of the claimants therein were damaged or destroyed by fire on July 22, 1913, during the currency of the policy, and the respondents did not dispute their liability to pay the sums properly assessed in respect of the loss of profits suffered by the claimants in consequence of the fire during the period of nine calendar months thence next ensuing. No claim was made by the claimants in respect of increased working expenses.

On November 17, 1913, Messrs. F. H. Lee & Greaves, the auditors mentioned in the policy, referred to in the case as the assessors, certified to the respondents in writing that the percentage which the sum insured bore to the total of the turnover of the claimants for the last financial year was 15·405*l.*, and that the turnover from the date of the fire to October 31, 1913, was less than the turnover for the corresponding period in the year preceding the fire, and applying the percentage of 15·405*l.* to the actual loss of turnover they assessed the amount of the claimants' loss for this period at 1124*l.* 0*s.* 1*d.*

The respondents duly paid that sum to the claimants and no dispute arose in respect thereof.

The assessors afterwards certified in like manner month by month the amounts of the claimants' losses in respect of profits for the succeeding months of the period of nine calendar months amounting in all to 1508*l.* 12*s.*

The certificate for November was in the following terms: "The turnover for November amounts to 673*l.* 2*s.* 7*d.* as against 2331*l.* 14*s.* 9*d.* in November, 1912, or a shortage of 1658*l.* 12*s.* 2*d.* The percentage payable, viz. 15·405*l.*, on this amount is 255*l.* 10*s.* 2*d.*"

The certificates for the other months were in a similar form.

The respondents subsequently denied their liability to the claimants for the respective amounts of these assessments on the ground (inter alia) that the loss of turnover so assessed was not in fact a consequence of the fire.

Differences having thus arisen out of the policy, the claimants appointed arbitrators, and the arbitrators duly appointed John Albert Compston, of the Middle Temple, one of His Majesty's counsel, to be their umpire. It was agreed between the parties that the arbitrators and umpire should sit together to hear and determine the said differences.

During the course of the hearing questions of law arose between the parties as hereunder stated, and they requested the umpire (the arbitrators having differed thereon) to state such questions for the opinion of the Court.

The claimants by their counsel contended that the assessment by the assessors of all losses under the policy necessarily involved the following matters, namely: (1.) the arithmetical computation of the percentage which the turnover for the last financial year bore to the sum insured; (2.) the ascertainment of the actual loss of turnover, if any, for each of the nine months succeeding the fire; (3.) that they were satisfied that such loss was in point of fact sustained in consequence of the fire. They further contended that the certificates of the assessors when given were in the nature of awards which could not be reviewed in an arbitration under condition 9 of the policy.

1915

RECHER & CO. v. NORTH BRITISH AND MERCANTILE INSURANCE COMPANY.

Mr. Alfred Greaves, a member of the firm of Lee & Greaves, who had acted for his firm in the preparation of the assessments, was called as a witness on behalf of the claimants. He stated that, though it did not so appear in terms on the face of the assessments, he was at the time of signing the same satisfied that the losses of turnover respectively therein stated were in fact sustained in consequence of the fire.

The respondents' counsel then proceeded to cross-examine the witness as to what matters he had taken into consideration in arriving at that conclusion. The witness appealed to the tribunal whether that was a question which it was permissible to put to him, claiming that in assessing the said losses he had been in effect an arbitrator between the parties. The umpire was of opinion that the witness could not be required to answer the question in the form in which it was submitted, but that he was bound to answer whether he had or had not taken into his consideration any specific matter which the respondents should put to him and which might bear upon the question whether the apparent loss of turnover was in fact the consequence of the fire.

The witness accordingly answered without further objection that he had in making the assessments taken into consideration various matters which were specifically put to him, such as whether there had been a general decline of the trade in hair, whether there had been a decrease in sale in the period after as compared with the period before the fire, and similarly as to purchases, wages paid, and workpeople employed, whether the damage by fire extended to the whole or part only of the premises and machinery of the claimants and the time occupied in restoring them to efficiency, and whether after such restoration the premises and machinery had been used as they were before the fire.

The respondents' counsel then intimated that they were desirous of cross-examining the witness to the effect that if he had taken these matters into consideration he could not possibly have arrived at the conclusion that the loss of turnover was the consequence of the fire. The umpire was of opinion that that would be in effect to ask him what were the elements which

entered into his consideration in determining the question of fact which, in the contention of the claimants' counsel and in the umpire's own view, was necessarily involved in the assessment, and that, as the umpire was further of opinion that the tribunal was bound by authority to hold that the assessor was a quasi-arbitrator, the line of cross-examination ought not to be pursued, and if pressed it ought to be excluded.

The respondents' counsel then intimated that they intended to call a number of witnesses to testify that, if the matters they had so far outlined by the cross-examination of the assessor and other kindred matters had in fact been taken into consideration by him, he could not possibly have arrived at the conclusion that the loss of turnover was the consequence of the fire, and that from such evidence, if accepted, the inference might be drawn that the assessor had not in reality considered such matters at all. They stated they did not allege that the assessor had acted fraudulently in the discharge of his functions.

The umpire was of opinion that the effect of such evidence would really be to show that the assessor had come to a wrong conclusion in point of fact, and that, there being no allegation that he had acted fraudulently, the suggested inference could not properly be drawn from the evidence, if accepted, in view of the declaration to the contrary of the assessor whom the respondents had themselves appointed or concurred in appointing to that position and who had admittedly acted honestly. The umpire stated, however, that, unless satisfied to the contrary by the claimants' counsel, he was of opinion that if it could be proved, either by the admission of the assessor himself or by other direct evidence, that he had not in fact considered the matters aforesaid, such evidence ought to be received and weighed.

The hearing was adjourned in order that the umpire might state this case.

The questions for the opinion of the Court were:—

1. Whether upon the true construction of the policy the assessors were empowered to determine, or conclusively to determine, (*a*) the amount, if any, payable to the insured under the policy, or (*b*) only the amount, if any, of the reduction in the turnover occasioned or not occasioned by the fire.

1915

RECHER & Co. v. NORTH BRITISH AND MERCANTILE INSURANCE COMPANY.

2. Whether the function of the assessors under the policy was as regards the turnover limited to assessing merely the figures of the turnover before the fire or of the turnover after the fire, and whether all other questions, including the question of the extent to which the reduction, if any, of the turnover after the fire was in fact a reduction in consequence of the fire, were in the event of dispute to be settled by arbitration under condition 9 of the policy.

3. Whether the certificates of the assessors put in by the claimants as being assessments by the assessors of the losses sustained and the amounts payable under the policy were (*a*) prima facie evidence of such losses and amounts merely, or (*b*) evidence thereof conclusively binding the insurance company, unless, as the umpire held, the insurance company proved expressly and directly that the assessors in arriving at such losses and amounts had not taken into consideration all material facts and matters.

4. Whether, the claimants having called as a witness Mr. Alfred Greaves, a member of the firm of auditors, to prove that he had in accordance with the policy ascertained the amount of the losses sustained by the insured and that such losses had been sustained in consequence of the fire and were the amounts shown by the said documents, the insurance company were entitled to cross-examine Alfred Greaves in the same way as an ordinary witness is liable to be cross-examined, and, among other things, were entitled to ask him what matters he had taken into consideration in arriving at the amounts of the losses and how he had arrived at the same, with a view to show (inter alia) (*a*) that he had not in fact assessed the losses in accordance with the policy and that he had included in the amounts certified as being the loss or shortage of turnover in consequence of the fire losses occasioned by causes other than the fire, and (*b*) that in arriving at the said amounts he had not taken all material matters into consideration and in particular had not taken into consideration losses occasioned by causes other than the fire.

5. Whether evidence to prove that the reduction in the turnover was wholly or partly due to causes other than the fire was admissible as evidence to show (*a*) that the assessors in treating

the entire reduction in the turnover in each of the nine months as a loss under the policy had not taken all material matters into consideration and in particular had not in fact taken into consideration the question of whether such reduction was wholly or partly due to causes other than the fire; (*b*) that the reduction in turnover certified had not been arrived at on the proper principle; (*c*) that the reduction in turnover certified in fact included losses not occasioned by the fire.

Tindal Atkinson, *K.C.*, and *Lowenthal*, for the respondents. The duty of the auditors under this policy is to ascertain the difference between the amount of turnover in the months after the fire and the turnover in the corresponding months in the year before the fire. The question as to what portion of that difference is a loss in consequence of the fire is one which in the event of a difference must be settled by arbitration under the ninth condition of the policy. The auditors are not arbitrators but assessors or valuers, and their assessments are not conclusive: *In re Carus-Wilson.*(1) But even if they can be regarded as arbitrators, when the member of the firm who made the assessments becomes a witness in the arbitration and gives evidence on behalf of the claimants, the respondents are entitled to cross-examine him in order to show that in making the assessments he has omitted to take into account other matters, besides the fire, which have or may have contributed to the reduction in turnover. The certificates do not state that the amount of the assessment is a loss of turnover in consequence of the fire; what the assessor has done is to take the whole difference in the turnover in each month, apply the percentage, and certify the resulting total as being payable. It cannot be the fact that but for the fire the amount of the turnover would have been exactly the same for the corresponding months in two successive years, but unless this be so, the assessor cannot have considered the question whether the reduction in turnover may not have been due to other causes besides the fire. The evidence of the assessor like that of any ordinary witness must be tested by cross-examination, and for this purpose the respondents are entitled to ask him

(1) (1886) 18 Q. B. D. 7.

1915

RECHER & Co. v. NORTH BRITISH AND MERCANTILE INSURANCE COMPANY.

what matters he has taken into consideration and whether he has not omitted to take into account certain other specified causes of loss. They are also entitled to call direct evidence to contradict the evidence of the assessor.

[RIDLEY J. referred to *Duke of Buccleuch* v. *Metropolitan Board of Works*. (1)]

That case established that an arbitrator may be called as a witness in a legal proceeding to enforce his award. It follows that, if he is called by either party as a witness, the other party is entitled to cross-examine him.

Bairstow, K.C., and *R. Watson*, for the claimants. The policy provides in express terms that "the amount of all losses under this policy shall be assessed by the insured's auditors." That means that the parties agree that the auditors, and no one else, shall assess the loss. They have certified the "percentage payable." That means, and can only mean, the amount of the loss recoverable under the policy, i.e., the loss of turnover incurred in consequence of the fire. The certificate is conclusive evidence of the extent of the respondents' liability under the policy. The judgment of Cleasby B. in the *Duke of Buccleuch's Case* (2) is in the claimants' favour, for he lays down that although an arbitrator may be called as a witness he cannot be asked, either in chief or in cross examination, the reasons for his decision. Lord Chelmsford in the same case said (3) that it is not permissible "to ask the umpire what were the elements which entered into his consideration in determining the quantum of compensation." That is exactly what the respondents are seeking to do by cross-examination of the assessor. They desire to show that he has assessed the amount of the loss at too high a figure, that he has made some mistake. They are not entitled to do so. The parties having agreed upon a particular person to assess the amount of the loss are bound by the assessment which he has made: *Chambers* v. *Goldthorpe*. (4)

LORD READING C.J. In this case the umpire has stated a special case for the opinion of this Court on questions which

(1) (1872) L. R. 5 H. L. 418.
(2) Ibid. at p. 436.
(3) Ibid. at p. 457.
(4) [1901] 1 K. B. 624.

have arisen in an arbitration between Messrs. Recher & Co. and the North British and Mercantile Insurance Company. The first question upon which a difficulty has arisen is as to the meaning of a clause in a policy of fire insurance against consequential loss. The clause is as follows: "The corporation will pay to the insured monthly at the end of each calendar month after the date of the fire until such time as reduction in turnover in consequence of the fire shall have ceased but not exceeding in all nine calendar months on account of annual net profit and standing charges," as provided in the policy, "the same percentage on the amount by which the turnover in each such month shall in consequence of the fire be less than the turnover for the corresponding month of the year preceding the fire as the sum or sums hereby insured shall bear to the total of the turnover for the last financial year." The meaning of the clause is that, first, the turnover for the month after the fire must be ascertained, and it must be compared with the turnover in the corresponding month in the previous year. Then one must ascertain what proportion of the reduction in the turnover has occurred in consequence of the fire, and the amount recoverable under the policy is the same percentage on the amount by which the reduction in turnover in consequence of the fire is less than the turnover of the corresponding month in the preceding year as the sum insured bears to the total of the turnover for the last financial year. Then there is a further clause which has given rise to the controversy in this case and which says: "It is agreed that the amount of all losses under this policy shall be assessed by the insured's auditors, Messrs. F. H. Lee & Greaves, Bradford, whom failing by a firm of chartered accountants to be mutually appointed by the corporation and the insured." By the ninth condition, which is incorporated into the contract, all differences arising out of the policy are to be referred to arbitration, and in case of dispute between the two arbitrators, they are to nominate an umpire.

A fire having occurred at the premises of the insured, the auditors, Messrs. F. H. Lee & Greaves, purported to assess the amount of the loss under the policy, and they issued documents showing the amount at which they assessed the loss for each

1915

RECHER & Co. v. NORTH BRITISH AND MERCANTILE INSURANCE COMPANY.

Lord Reading C.J.

month after the fire. A dispute arose as to the amount payable under the policy, and an arbitration was held before two arbitrators and an umpire. In the course of the arbitration certain questions arose, which are stated in the case and which in the main relate to the meaning and effect of the clause in the policy which provides that the amount of the loss shall be assessed by the auditors. On behalf of the insured it is said that the clause means that the auditors are to assess the amount payable to the insured under the policy and that their decision cannot be questioned. On the other hand the insurance company say that the clause is only intended to give the auditors power to assess the amount, subject always to questions of law either as to construction, or as to conditions precedent, or otherwise, which may arise under the policy. The answer to the first and second questions asked by the special case is that we are of opinion that the auditors are empowered, if they properly direct themselves in law, to determine the amount of the losses under the policy, but that they have not the right merely to state the amount which is payable under the policy and to have that determination treated as conclusive as to the amount payable to the insured. The third question is whether the assessments made by the auditors of the losses sustained and the amounts payable under the policy are merely prima facie evidence of the losses and amounts payable, or whether they conclusively bound the insurance company. The answer to that question is that if the auditor properly directs himself, as we have already indicated in our answers to the first and second questions, the amounts assessed would conclusively bind the insurance company, but not if it were established that the auditors had omitted to take into consideration any of the provisions of the policy, or some other material matter. Supposing, for example, it could be proved that the auditors had misdirected themselves on a point of law, the amount so arrived at would not be conclusive; but it would not be sufficient for the insurance company to show merely that the auditors had made a mistake in arriving at the amount or had fixed the loss at too high a figure, or in some other way had arrived at an erroneous conclusion of fact.

The fourth question raises a question of procedure. If the

auditor is called as a witness at an arbitration under the policy, we are of opinion that it is open to counsel for the opposite party to cross-examine him upon any issue which is relevant, and it is immaterial for this purpose to consider whether he is to be regarded as an arbitrator or merely as an assessor of the amount of the loss with limited rights and powers. Counsel would not be entitled to cross-examine him merely to prove that in arriving at the amount of the loss he had made mistakes in the figures, for that would not be a relevant issue. But if the auditor has given evidence in chief that he has taken into consideration all the material facts and matters and that he has arrived at the reduction or loss in turnover in consequence of the fire, it is relevant to the issue to determine whether that is a true statement of the facts. There is no suggestion in this case that the auditor was wilfully stating what he knew to be untrue. It is admitted that he was not acting fraudulently and that his evidence was given honestly, but nevertheless it is and must be open to the insurance company to attempt to show that the auditor is wrong in this view and to cross-examine the auditor for the purpose of inviting the tribunal to say that it cannot accept this statement of fact by the auditor.

We have been referred to the case of *Duke of Buccleuch* v. *Metropolitan Board of Works* (1), but an examination of that case shows that it is not an authority for the proposition that an arbitrator, or a person in the position of this auditor, cannot be cross-examined for the purpose of testing the evidence which he has given, or can only be cross-examined in the very limited way permitted by the umpire in this case. It must be borne in mind that the evidence under discussion in the *Duke of Buccleuch's Case* (1) was evidence in chief, to which very different considerations apply. The House of Lords did no doubt limit materially the questions which could be put in examination in chief to an arbitrator; but, when evidence has been given in chief, the cross-examination of the witness, so long as it is directed to a relevant issue, cannot be limited in the way contended for, nor is there anything in the *Duke of Buccleuch's Case* (1) which does so limit it. We therefore think that in this

(1) L. R. 5 H. L. 418.

1915

RECHER & Co. v. NORTH BRITISH AND MERCANTILE INSURANCE COMPANY.

Lord Reading C.J.

case it was permissible to cross-examine the auditor in order to show that he had taken into account reduction in turnover which was not a consequence of the fire, that is to say, that in arriving at his conclusion he had failed to direct himself that, after arriving at the total reduction in turnover for the months in question as compared with the corresponding months in the previous year, he must ascertain how much of that reduction was in consequence of the fire. I have indicated already and I desire to make it perfectly plain that that being a relevant issue, the auditor may be cross-examined about it, although it may be that the questions put in cross-examination might also be material to the question, if that were a relevant issue, which it is not, that the auditor had arrived at an erroneous conclusion of fact on the figures presented to him. The umpire would not be justified in shutting out a relevant question in cross-examination merely because it was also relevant to some other issue which could not be raised in the arbitration.

The fifth and only remaining question is really answered by what I have already said with regard to the fourth question. The insurance company are, in our opinion, entitled to give evidence for the purpose of establishing that the auditor has not taken into consideration the fact that the losses recoverable under the policy must be losses which have arisen solely in consequence of the fire, or in other words to show that the auditor has misdirected himself in arriving at the amount of the losses. Evidence is admissible for this purpose, but care must be taken that the admission of this evidence does not give rise to confusion, and that the tribunal does not consider the evidence from the point of view as to whether or not the auditor has arrived at a wrong conclusion of fact. The auditor cannot be cross-examined, nor can evidence be given, for that purpose.

Having regard to the documents issued by the auditor there does seem some ground for doubting whether the auditor has limited the amount of the loss to the loss in consequence of the fire, for he appears to have taken the amount of the turnover for the month in the previous year and to have merely deducted from it the amount of the turnover for the corresponding month after the fire. It may be that the auditor will be able

to satisfy the tribunal that he has in fact done what he says, that is, that he has limited the amount to the loss in consequence of the fire. If so, there will be an end of the matter, but, for the reason that there is on the face of the documents a difficulty which requires explanation, we have come to the conclusion that the insurance company are entitled to establish if they can, by evidence and by cross-examination of the auditor, that the figures given by the auditor include loss of turnover due to other causes than the fire.

RIDLEY J. I agree. My Lord has dealt so thoroughly with all the points raised by the case that I have very little to add. It seems to me that it might in some cases be a question of nicety whether a person is in the position of an arbitrator, or merely of an assessor or valuer. In this case the auditors are called "assessors." The documents which they have issued are not such as are ordinarily issued by arbitrators, and there were no proceedings before them partaking of the character of an arbitration. I am inclined to think that they were intended to be valuers and not arbitrators, but however that may be, it seems to me that when the auditor was called as a witness he could be cross-examined as to whether or not he had taken into consideration the question of how far the reduction in turnover was a loss in consequence of the fire. He might also be asked in what sense he understood that phrase. Further, the insurance company were not bound to accept his answers, but were entitled to call evidence to show that it was impossible, if the auditor confined himself to the loss occasioned by the fire, as he said he did, that he could have arrived at the result at which he did. I entirely agree with the judgment of the Lord Chief Justice.

SCRUTTON J. I agree with the answers to the questions proposed by the Lord Chief Justice.

Solicitors for claimants: *Greaves & Greaves, Bradford.*

Solicitors for respondents: *Vincent & Vincent, for Peckover, Scriven & Co., Leeds.*

F. O. R.

C. A.

1915

March 12, 16, 17, 18.

[IN THE COURT OF APPEAL.]

WILLIAM FRANCE FENWICK & CO., LIMITED *v.* MERCHANTS' MARINE INSURANCE COMPANY, LIMITED.

[1913 W. 1756.]

Insurance (Marine)—Running down Clause—Damage in Consequence of Collision—Construction of Clause.

By a policy of marine insurance upon the hull and machinery of a steamship it was agreed that if the ship thereby insured should come into collision with any other ship or vessel, and the assured should in consequence thereof become liable to pay, and should pay by way of damages to any other person or persons any sum or sums . . . . the underwriters would pay the assured a certain proportion of such sums.

The insured ship by reason of her negligent navigation came into collision with another ship which she was overtaking. The impact was very slight and had practically no effect. After the collision the other ship, by reason and as a direct consequence of the incidents of the collision, including the manœuvres properly adopted by her to minimize the effects of the collision, came into collision with a third ship, to which a large amount of damage was done. The owners of the insured ship having been held alone to blame for both collisions became liable to pay, and paid, sums in respect of damages arising out of both collisions. In an action brought by the owners of the insured ship to recover from the insurers the proportion underwritten by them of the sums so paid for damages:—

Held, that the right inference to be drawn from the facts as proved was that the collision with the third ship was a consequence of the collision between the insured ship and the other ship within the meaning of the clause, and that therefore the insurers were liable to pay to the owners of the insured ship the proportion they had underwritten of the damages arising out of both collisions.

Decision of Bailhache J. [1914] 3 K. B. 827 affirmed on other grounds.

Appeal by the defendants from a decision of Bailhache J. (1)

The facts are stated in the report of the case in the Court below and also in the judgment of Lord Reading C.J. hereinafter set out.

Sir R. Finlay, K.C., *Leslie Scott, K.C.*, and *Mackinnon, K.C.*, for the appellants. The collision between the *Rouen* and the

(1) [1914] 3 K. B. 827.

Galatée was caused by the proximity of the *Rouen* to the *Cornwood* resulting from the negligent navigation of the *Cornwood*; it was in no sense a consequence of the collision between the two last-named vessels. Only the proximate cause can be considered: *Pink* v. *Fleming* (1); *Ionides* v. *Universal Marine Insurance Co.* (2); *M'Cowan* v. *Baine*. (3) The proximate cause was the fact that the *Cornwood* let her wash get so near to the *Rouen* as to cause her to swing to port and collide with the *Galatée*. The Court ought not to go further back than that, but if it does, then it is submitted that the negligent navigation of the *Cornwood* was the proximate cause.

It is true that the damage to the *Galatée* arose immediately after the collision between the *Rouen* and the *Cornwood*, but it was not caused by that collision, for it would have happened even if that collision had not occurred, because the cause of the damage was the *Cornwood's* crossing the bows of the *Rouen*. When once that had taken place there was negligent navigation on the part of the *Cornwood*, and the attraction of the stem of the *Rouen*, or the blow or push of the stem of the *Rouen* on the starboard quarter of the *Cornwood*, really had no effect upon what was taking place. The *Cornwood* continued her negligent navigation, and as she passed the *Rouen* almost at right angles, with her propeller driving her at ten knots an hour, the wash from her propeller operated upon the starboard bow of the *Rouen*, forcing the head of the latter round to port and out into the middle of the river and causing her to collide with the *Galatée*.

On the facts as proved the collision between the *Rouen* and the *Cornwood* was negligible from all points of view—negligible as a blow, non-existent as a pivot, and limited in duration. The forces that were operating in the water and through the water sent the bow of the *Rouen* over to port and caused her collision with the *Galatée*. It is not right to say that that collision was in any sense the consequence of the contact between the *Rouen* and the *Cornwood*.

Adair Roche, K.C., and *Balloch*, for the respondents. The respondents have to establish that the collision of the *Rouen*

(1) (1890) 25 Q. B. D. 396. (2) (1863) 14 C. B. (N.S.) 259.
(3) [1891] A. C. 401.

C. A. 1915

WILLIAM FRANCE FENWICK & Co., LIMITED v. MERCHANTS' MARINE INSURANCE COMPANY, LIMITED.

with the *Cornwood* was a proximate cause of the damage to the *Galatée* resulting from her collision with the *Rouen*. The swing of the *Rouen* to port was the result of her collision with the *Cornwood;* but for that collision the *Rouen* never would have swung to port as she did and get into the middle of the stream, and that was a consequence of the proximity, i.e., of the contact, which was the collision. The contact partly caused and certainly accentuated the swing to port. The increase of impetus was caused by the added forces consequent upon the fact of contact proximity which made the play of those forces very serious. The weight of water and those forces were accumulating and were in active operation during the contact, and the moment the *Rouen* disengaged herself from the *Cornwood* they began at once to operate and never ceased to operate. The respondents ask the Court on the admitted facts to say that all the rest resulted from this contact notwithstanding that concurrent and co-operative causes may have contributed: *Reischer* v. *Borwick.* (1) The porting of the helm and the reversing of the *Rouen* were collision manœuvres.

In saying that the collision between the *Rouen* and the *Galatée* was not due to the actual impact between the *Rouen* and the *Cornwood*, Bailhache J. drew a distinction between impact and contact, and he did find that contact proximity was the cause.

The evidence shows that there was no supervening element of negligence such as the appellants suggest.

Leslie Scott, K.C., in reply. It is essential for the respondents to prove that the collision caused the accumulation or increase of forces which they allege. There is no evidence that during the contact there was any such increase or accumulation of forces. On the contrary the contact tended to, and did in fact, neutralize the forces. The collision between the *Rouen* and the *Galatée* would have happened in any case whether or not there had been a collision between the *Cornwood* and the *Rouen*, and the second collision cannot, on the facts proved, be said to be a consequence of the first collision.

LORD READING C.J. The plaintiffs, who are the owners of the steamship *Cornwood*, brought their action against the under-

(1) [1894] 2 Q. B. 548.

C. A.
1915

WILLIAM FRANCE FENWICK & Co., LIMITED v. MERCHANTS' MARINE INSURANCE COMPANY, LIMITED.

Lord Reading C.J.

writers under a policy of insurance containing the Institute Time Clauses. It is with regard to the first clause of the Institute Time Clauses that the question now at issue has arisen; the plaintiffs claiming that they are entitled to recover from the underwriters part of the damages which they have been held liable to pay in consequence of a collision which occurred between the *Cornwood* and the *Rouen* and a collision between the *Rouen* and the *Galatée*; the plaintiffs contending that, on the true view of the facts, the damage to the *Galatée* arose in consequence of the collision between her and the *Rouen*. The material words of the clause upon which this case depends are: "And it is further agreed that if the ship hereby insured shall come into collision with any other ship or vessel, and the assured shall in consequence thereof become liable to pay, and shall pay by way of damages to any other person or persons any sum or sums not exceeding in respect of any one such collision the value of the ship hereby insured, this company will pay the assured such proportion of three-fourths of such sum," and so forth. The question in this case is whether the plaintiffs have brought themselves within the words "shall in consequence thereof"—that is, in consequence of a collision with another ship, "become liable to pay and shall pay" the damages.

This case has been ably argued. The history of the litigation dates back to proceedings in the Admiralty Court. As a consequence of the events on the day this damage was done, an action was brought in the Admiralty Court; and as a result of it, the *Cornwood* was held alone to blame. It is desirable to state the facts with some particularity, as the question which this Court has to answer depends upon a true view of the facts; the question being whether the damage claimed was a consequence of the collision between the *Cornwood*, the vessel insured under the policy, and another vessel. The *Cornwood* and the *Rouen* were both steamships proceeding up the river Seine to Rouen. They were vessels, as they then stood, with a displacement of about 5000 tons apiece. The *Rouen* was ahead of the *Cornwood*, proceeding up the river, when close to the La Risle light, which is on the starboard bank, that is to say the south bank, the *Cornwood* gave the signal that she wished to pass

C. A. 1915

WILLIAM FRANCE FENWICK & Co., LIMITED v. MERCHANTS' MARINE INSURANCE COMPANY, LIMITED.

Lord Reading C.J.

the *Rouen* on the *Rouen's* port side. The *Rouen* repeated the signal, which, according to the rules in force on the river Seine, meant that she acceded to the wish of the *Cornwood* to pass her. As the *Cornwood* then proceeded to come up on the port side of the *Rouen*, the *Rouen* reduced her speed. The *Cornwood* then put her helm to port and cut across the *Rouen's* bows. Seeing that a collision was inevitable, or at the moment of collision, or it might be at an even almost indefinable space of time immediately after the collision, as it is quite impossible in such matters as these to be absolutely precise in point of time, the *Rouen* reversed her engines and put her helm a-port; but nevertheless in not sufficient time, and not with sufficient effect to prevent a collision between the anchor on her port bow and the starboard quarter of the *Cornwood*. The *Cornwood* was steering by a light on the shore called the Marais Vernier, on the south bank. The *Rouen* was also steering by the same light; so that both vessels when at a distance apart—again it is not possible to speak with precision, but, according to the finding of the Admiralty Court, of about ten feet apart—were on a gradually converging course, a slightly converging course. As the *Cornwood* drew ahead and there was a little distance between the two vessels, she ported across the bows of the *Rouen*, and in that way, drawing ahead of the *Rouen*, attempted to get over to the other side clear of the *Rouen* by this manœuvre of porting her helm. The *Cornwood* was going at a pace of ten knots an hour. At this time the *Rouen*, after she had acceded to the signal that the *Cornwood* wished to pass her, was going at three to four knots—it may be a little more. As the *Cornwood* passed ahead of the *Rouen*, the stem of the *Rouen* was attracted by the *Cornwood*; that is, the *Rouen* at this moment drew from her course towards the *Cornwood*. There was a suggestion persisted in in the Court of Admiralty that what happened was that the *Rouen* steered carelessly, and sheered towards the *Cornwood*, but that view was rejected by Bargrave Deane J. as a cause of the deflection of the *Rouen's* stem. He held that the attraction of the stem of the *Rouen* to the starboard quarter of the *Cornwood* was by the interaction of forces owing to the displacement caused by the *Cornwood* as she passed across the *Rouen*. There is no doubt

that there is such a phenomenon as this attraction; and it is not in one sense in dispute. It is agreed on both sides that there would be such an interaction of forces as in those circumstances would cause the stem of the *Rouen* to be drawn to the quarter of the *Cornwood*. That did actually happen. Then a collision took place, which undoubtedly was of a very slight character. That seems to be common ground. There has been some discussion to-day as to whether it was an impact between the two vessels, or whether it was only a contact between them. It does not seem to me that it matters in the slightest degree. The vessels did actually come into contact, and, therefore, into collision. The collision was between the stem of the *Rouen* and the starboard quarter of the *Cornwood* at some thirty feet from the stern. The collision, besides being very slight, was momentary only. Again it is impossible to speak with precision of the time, but the witnesses agree that in fact the collision itself, that is the actual blow or push, was in itself negligible. There was a certain amount of damage done, no doubt, to the *Cornwood*; but the whole matter was of little consequence, one might have said, but for what happened after the collision.

Now immediately before or after the collision the *Cornwood* hard a-ported her helm; and therefore at the moment of collision, or just after the collision, was going straight across, almost at right angles to the *Rouen*, to the south bank—to starboard. As she proceeded in that way, the *Rouen*, which had been coming to port just before the collision, when disengaged from contact with the *Cornwood*, again swung or continued her swing to port; and apparently whatever she did, whatever steps she took to counteract this swing, could be of no avail. It is said that that again was all the result of the forces that were operating; and that it was the result of the collision which had taken place. The conflict of fact in this case, if there is really a definite conflict of fact,—perhaps I should say the argument as to the right inference to be drawn from the facts as proved—is that the plaintiffs on the one hand say that but for the collision the *Rouen* never would have swung round to port as she did, and thus got into the middle

C. A. 1915

WILLIAM FRANCE FENWICK & CO., LIMITED v. MERCHANTS' MARINE INSURANCE COMPANY, LIMITED.

Lord Reading C.J.

of the stream, where she struck amidships the *Galatée* (a vessel coming down the river) almost at right angles to her. That blow caused undoubtedly very serious damage; and it is the damage to the *Galatée* which has given rise to this litigation. That being the cause, the plaintiffs contend that the damage which they have had to pay by reason of the decision of the Court of Admiralty to the *Galatée* was a consequence of the collision between the *Cornwood* and the *Rouen;* and if so, they are entitled to recover under their policy. On the other hand, the defendants say that the damage to the *Galatée* was not caused by the collision, although it is true it arose immediately after the collision, but that it would have happened even if there had been no collision: because the cause of the damage was the *Cornwood* porting to go across the bows of the *Rouen*. It is said that that was negligent navigation; and the attraction of the stem or the blow or the push from the stem of the *Rouen* on the starboard quarter of the *Cornwood* really had no effect. The *Cornwood* continued her negligent navigation; and, having got into that position as she passed the *Rouen* almost at right angles, with her propeller moving,—she was going at the rate of ten knots an hour—the wash from her propeller, with the ship in that position, operated upon the starboard bow of the *Rouen* and so forced the head of the *Rouen* round to port, and into the middle of the river, and into the *Galatée*.

The real question in this case is whether this swing of the *Rouen* to port after the collision arose from the negligent navigation of the *Cornwood*, and not from the collision between the *Rouen* and the *Cornwood*. If it arose both from the negligent navigation of the *Cornwood* and from the collision which followed the negligent navigation, then the plaintiffs would be right in saying that it arose in consequence of the collision. The learned judge in the Admiralty Court found that the damage was the result of the collision, or the proximity of the *Cornwood* and the *Rouen* at the particular time.

On the facts of the case there is no dispute between the parties up to the particular point which I have just mentioned. The case in the Admiralty Court was taken to the Court of Appeal and to the House of Lords, and Bargrave Deane J.'s judgment

was affirmed. Now it is to be noticed in the language which I have quoted of Bargrave Deane J. that he did not decide the point which we have to decide. The result depends upon whether this Court thinks that it was the collision or the proximity that caused the *Galatée's* damage. If it was the collision, the plaintiffs must succeed. If, on the other hand, it was only the proximity by reason of the negligent navigation of the *Cornwood*, then the plaintiffs will have failed to establish that the damage arose in consequence of the collision.

In that state of facts it seems to me unnecessary to discuss in greater detail what the position of these vessels was before the collision; and, indeed, before us those facts are scarcely, if at all, in dispute. But when we approach the events immediately after the collision, then we are in an acutely debated area. I desire to say for myself that I am not inclined in this case to attribute too much importance to the scientific evidence as to the results that would follow from this interaction of forces or attraction phenomenon immediately after the collision. The evidence upon this point was summed up by Bailhache J. after an answer "The helm necessary to keep her course increases very rapidly as the side of the vessel is approached." Then Bailhache J., having heard the evidence of Professor Gibson, says: "But that is not because of the collision; it is because the forces which are brought into play by the close proximity of these two vessels are brought more and more strongly into play as proximity increases and, of course, they are at their very strongest when there is actual contact." Mr. Leslie Scott agreed that if by "when there is actual contact" you do not mean "whilst they are in actual contact," he would not dissent from that as a true view of what would happen. But he says that does not assist in this case, because the actual contact having taken place—and assuming that the forces did not operate whilst the contact was actually in operation—there would be a neutralizing of those forces by reason of the natural tendency of the *Rouen* to be deflected to starboard by reason of the push or blow on the *Cornwood*. Therefore he says, so far, whatever the impetus was that was given to the *Rouen* to port by reason of the attraction was stayed—he says it was actually

C. A. 1915

WILLIAM FRANCE FENWICK & Co., LIMITED v. MERCHANTS' MARINE INSURANCE COMPANY, LIMITED.

Lord Reading C.J.

stopped by reason of this collision—and that what happened thereafter had really nothing to do with this interaction of forces.

The plaintiffs, on the other hand, contend that the close proximity of the vessel made this play of forces very serious the moment the *Rouen* disengaged herself from the *Cornwood;* and it began at once to operate, and, indeed, the plaintiffs say never ceased to operate. The plaintiffs do not agree that the forces are not in active operation whilst the vessels are in contact. The argument is that the weight of water and the forces were accumulating whilst the two vessels were in contact, because there would be no outlet for the water which otherwise would pass along the quarter and stern of the *Cornwood.* I do not propose to lay any stress upon this scientific evidence. I am satisfied that there is an attraction in these circumstances, and, indeed, it is not disputed. I am also satisfied that the moment there was a collision the engines of the *Rouen* were reversed, and the effect, with the tide as it was then, would be a certain loss of control,—I would prefer to say a loss of steering way. The reversal of the engines in those circumstances would have that effect; and would, therefore, operate upon the direction of the head of the *Rouen* which is the material point in question in this case. It seems to me that when the two vessels collided, moving as these two vessels were, the *Cornwood* going across the bow at ten knots an hour, the *Rouen* going at a speed of three or four knots an hour, and when collision was inevitable, or at the moment of collision, the *Rouen* reversed her engines, and did her utmost to minimize the effects of the collision. She did it with some success, and the damage to the *Cornwood* was quite negligible; but in the operation the *Rouen* was drawn with her head out to the centre of the river, further to port, and with a loss of steering way upon her, her engines going astern. We are dealing now with matters almost of seconds, certainly of a minute or minutes at the very utmost, and the fact of the swinging out to port of the *Rouen's* bow in such circumstances, in consequence of her having to reverse her engines and to take measures to prevent the collision, did result in the damage.

I then put to myself the question whether, upon those facts,

the collision with the *Galatée* was the consequence of the first collision. I come to the conclusion that it was. I think that it is a finely balanced question, and that arguments have been advanced on either side of great force and cogency; but I think that the *Cornwood* did, by this collision, cause the *Rouen* to come into collision with the *Galatée*.

Therefore, in my opinion the conclusion at which Bailhache J. arrived is right; although I do not think that I am arriving at it by the same process of reasoning, or upon the exact findings of fact of Bailhache J. He seemed at the end of his judgment to halt at the precise point which it was necessary to decide—I am not sure that the criticism of the language may not be perhaps a little too fine—when he says this: "I think it is sufficient to find that the forces put into operation by the negligent navigation of the *Cornwood* did in fact not only cause a collision between herself and the *Rouen*, but, having done that, afterwards sent the *Rouen* into the *Galatée*." If the words "having done that" are to be taken literally that finding would not be sufficient in my opinion to carry the plaintiffs; but having regard to the evidence I have come to the conclusion, not without hesitation and doubt during the course of the case, that, in the circumstances, the collision with the *Galatée* was brought about by the collision of the *Cornwood* with the *Rouen*. For that reason I am of opinion that this appeal must be dismissed.

SWINFEN EADY L.J. The question raised by this appeal turns upon the construction and true effect of part of the running down clause in the Institute Time Clause which is attached to a policy of insurance. By the terms of that clause it was agreed that if the ship insured should come into collision with any other ship or vessel "and the insured shall in consequence thereof become liable to pay, and shall pay by way of damages to any other person or persons any sum or sums not exceeding in respect of any one such collision the value of the ship hereby insured," then the company will pay. The material words that have to be construed and dealt with in this clause are the words "in consequence thereof."

The collision between the *Cornwood* and the *Rouen*, and

C. A.
1915

WILLIAM FRANCE FENWICK & Co., LIMITED v. MERCHANTS' MARINE INSURANCE COMPANY, LIMITED.

Swinfen Eady L.J.

afterwards between the *Rouen* and the *Galatée*, has already been the subject-matter of proceedings in the Admiralty Court. The question there, of course, was different from the question which we have to decide; but the facts as found and determined by the Court of Admiralty and ultimately by the House of Lords are the basis from which we start in this case. The question to be determined there was whether the *Cornwood* or the *Rouen* was the ship to blame for the collision which took place between the *Rouen* and the *Galatée*. The collision between the *Rouen* and the *Galatée* was the result of the action of one or both of the *Cornwood* and the *Rouen*—one or both of those vessels being to blame. It was ultimately determined that the *Cornwood* was to blame for the collision: so that we start with that fact.

The collision between the *Cornwood* and the *Rouen* was itself very slight, and caused very slight damage; but the damage occasioned to the *Galatée* by the collision with the *Rouen* was very serious damage, involving, we are told, something like 15,000*l*. In the litigation in the Admiralty Court it was held that the *Cornwood* was to blame. The present case raises the question whether that collision for which the *Cornwood* was to blame was in consequence of the collision between the *Cornwood* and the *Rouen*. The judge below has held that it was; but the appellants contend that he has misdirected himself in point of law, and that upon the facts as he found them he ought to have decided the other way. That contention is based upon this finding. Bailhache J., after pointing out that actual contact between the two vessels, that is to say, collision between the ship insured and some other ship or vessel, is essential in order to bring this clause into operation, proceeded as follows: "In one sense it is quite true to say that the collision between the *Rouen* and the *Galatée* was not due to the collision between the *Rouen* and the *Cornwood*, that is to say, it was not due to the actual impact between the two vessels. I do not think it was. The impact, so far as it had any effect at all, was to drive the *Rouen* away from the *Galatée*." It is said that that finding of fact goes the whole way; and that as the judge found that the collision between the *Rouen* and the *Galatée* was not due to the actual impact between the two vessels, the *Rouen*

and the *Cornwood*, he ought to have said that the plaintiffs were not entitled to succeed. In my opinion, according to the true construction of a clause such as the present, an assured may become liable to pay damages in consequence of a collision between his ship and another ship, although the damage is not immediately and directly caused by the actual impact between the two colliding vessels. The learned judge afterwards goes on to say this: "It does not seem to me to be necessary at all, granted that there is a collision, to find that the actual impact of the two vessels drove the *Rouen* into the *Galatée*. I think it is sufficient to find that the forces put into operation by the negligent navigation of the *Cornwood* did in fact not only cause a collision between herself and the *Rouen*, but, having done that, afterwards sent the *Rouen* into the *Galatée*." That is a part of his judgment which has been much commented upon. It is possible that the negligent navigation of the *Cornwood* might have caused a collision between that vessel and the *Rouen*, and the negligent navigation of the *Cornwood* might also, and subsequently, have caused the *Rouen* to collide with the *Galatée*, and yet the collision between the *Cornwood* and the *Rouen* would not necessarily have caused the collision between the *Rouen* and the *Galatée*.

It is therefore necessary to consider how the facts of this case stand. In the navigation of these vessels proceeding up the river, owing to the improper way in which the *Cornwood* was navigated, she approached too close to the *Rouen*. There was an attraction between these vessels, with actual collision. The effect of the attraction was to cause the bows of the *Rouen* to be turned to or inclined to port, which action was for the moment arrested during the time the vessels were in contact; but, after the *Cornwood* had proceeded to pass the stem of the *Rouen*, the port direction of the *Rouen* proceeded, and was accelerated by the wash of the *Cornwood* on the starboard bow of the *Rouen*. Moreover, in order to avert a collision those on board the *Rouen*, seeing the collision was imminent, had put their helm hard a-port, and had reversed the engines. The consequence was that the *Rouen* was setting across the stream, and had lost her steering way, and proceeded directly into the *Galatée*, striking the *Galatée* almost at

C. A. 1915

WILLIAM FRANCE FENWICK & Co., LIMITED v. MERCHANTS' MARINE INSURANCE COMPANY, LIMITED.

Swinfen Eady L.J.

right angles. Mr. Littledale, who is a master mariner, was cross-examined with regard to the actual or direct effect of the impact itself between the *Cornwood* and the *Rouen*; and he said that might be disregarded, that it was a blow and not a push, and that as a blow it might be disregarded. Then, dealing with the *Rouen's* being out of control, he said "a ship is always out of control in a collision," and then he explained that as meaning "from the mere fact that once in a collision various actions have to be taken, such as putting her engines astern to minimize the effect of the blow." "It is a recognized thing at sea in collisions that your vessel is altogether out of control for the time being. Her speed is reduced. The moment you put your engines astern you have lost control of your ship," meaning that the ship has diminished control and steering way. The too close proximity of the *Cornwood* and the *Rouen* occasioned the collision between them, and a direct consequence of the incidents of the collision, including the manœuvres necessitated by the collision, was the cause of the *Rouen* striking the *Galatée*. Under these circumstances, I am of opinion that the damage occasioned to the *Galatée* arose in consequence of the collision between the *Cornwood* and the *Rouen*, although not the direct and immediate consequence of the impact—although one ship was not, by the force of the impact, driven directly against the other. The collision, with what has to be taken as part of the collision,—the attendant incidents of the collision—produced the subsequent result. For these reasons I am of opinion that the judgment below was right, and that the appeal should be dismissed.

BRAY J. The question which we have to decide is this:—whether the assured was, in consequence of the collision, liable to pay a large sum to the *Galatée* for the injury done to her by the collision between the *Rouen* and the *Galatée*. In order that the plaintiffs may succeed it is necessary first of all to show that there was a collision. There is no question about that. The next thing we have to see is what were the circumstances in existence; what were the position of the ships and the forces in play at the moment of the collision, or, perhaps, immediately before it; and lastly, we have to consider what took place after

the collision. At the moment of the collision the *Rouen* was proceeding at a slow speed, probably not exceeding four knots; and if I recollect right, with the tide. She had been stopped for the purpose of avoiding or minimizing the collision very shortly before the collision happened—a very proper and necessary manœuvre on the part of the pilot. Either at the moment of collision, or just before or just after, her engines had been put full speed astern—again a very proper and necessary manœuvre. She was swinging to port, owing to the attractive forces which had been brought into play by the proximity of the *Cornwood*. The *Cornwood* was going at a higher speed, possibly nearly ten knots, and at the moment of collision was crossing the bows of the *Rouen*. Again, either at or immediately after the collision, she ported her helm for the purpose, if possible, of avoiding or at all events minimizing the force of the collision. The *Galatée* was at a short distance away, certainly under 200 yards, perhaps considerably less than that; and the time between the two collisions could not much have exceeded a minute, and certainly could not have exceeded two minutes. That is the position at the moment of the collision. I should have added that the attractive forces which had been brought into play by the proximity of the *Cornwood* were at their strongest at that moment. What was the position at the moment that was produced by the collision? It was necessary to put the engines of the *Rouen* full speed astern. That, if not putting her out of control,—if one does not go quite so far as the witness said—would at once at all events very seriously diminish his control of her and her steering powers. In consequence of that, she continued to swing to port, notwithstanding that her helm was put hard a-port to avoid if possible the consequences. In my opinion the collision, and the manœuvres which were necessarily taken in order to avoid or minimize the collision, were the cause of the *Rouen* being unable to avoid the *Galatée*.

There was another point, which was dwelt upon very strongly by the defendants; and that was that this second collision was caused by the wash from the propeller of the *Cornwood* which was said to be due to negligent navigation of the *Cornwood*. There is no doubt that that wash prevented the *Rouen* from being able to

C. A. 1915

WILLIAM FRANCE FENWICK & Co., LIMITED v. MERCHANTS' MARINE INSURANCE COMPANY, LIMITED.

Bray J.

avoid the *Galatée*; there is no doubt that it fell on her starboard bow and sent her to port in the direction of the *Galatée*, but in my opinion that was not a negligent act of the *Cornwood* at all. The *Cornwood* could not help it, the position being what it was at the time of the collision. The *Cornwood* very properly ported her helm in order, as I have said, if possible to avoid and to minimize the collision. The result of that would be that it would bring the two vessels very nearly at right angles through the wash of the propeller upon the bow of the *Rouen*. If it were shown that that was a negligent act on the part of the *Cornwood*, it might well be said that the causes to which I have referred were too remote; but in my opinion it was not a negligent act of the *Cornwood*. Having regard to the position, the *Cornwood* could take no other course than she did. I daresay she did not anticipate what the consequences would be; but there was no negligence on her part. The result, therefore, is that in my opinion the collision and the manœuvres which both parties adopted, and rightly adopted, to minimize the collision, and the course taken by them after and in consequence of the collision, led to the second collision with the *Galatée*, and, consequently, the first collision was the cause of the second collision.

That being so, the judgment of the Court below in my opinion was right.

Appeal dismissed.

Solicitors: *Waltons & Co.; Botterell & Roche.*

R. M.

LONDON COUNTY COUNCIL, Appellants *v.* BERMONDSEY BOROUGH COUNCIL, Respondents.

1915
June 7.

London—Public Health—Offensive Businesses—Duty to take Proceedings for Offences—Sanitary Authority—"Default in doing their duty" under the Act—Proceedings by County Council—Public Health (London) Act, 1891 (54 & 55 *Vict. c.* 76), *ss.* 19, 100.

A duty to enforce the provisions of s. 19, sub-s. 1, of the Public Health (London) Act, 1891, relating to offensive businesses is imposed by that Act upon the sanitary authority, and therefore the sanitary authority by refusing to take proceedings to enforce those provisions make "default in doing their duty under this Act," within the meaning of s. 100, and the county council may institute the proceedings and, if successful, recover their expenses from the sanitary authority under the provisions of the latter section.

Case stated by a metropolitan police magistrate.

A summons was taken out by the appellants, under s. 117 of the Public Health (London) Act, 1891, against the respondents in these terms: "The plaintiffs complain that, the defendants having made default in doing their duty under the Public Health (London) Act, 1891, the plaintiffs have, under s. 100 of the said Act, incurred expenses in and about a proceeding that the defendants might have instituted against certain persons, viz. Freeland & Smiths, under the said Act, and that a balance of such expenses still remains unrecovered. The plaintiffs claim such balance of 15*l.* 15*s.* against the defendants, the said proceeding having terminated successfully on the 8th day of October, 1913."

Upon the hearing of the summons the following facts were admitted. Freeland & Smiths had committed and been duly convicted of an offence under sub-s. 1 (*a*) of s. 19 of the Public Health (London) Act, 1891, upon the information and at the instance of the appellants. The respondents were the sanitary authority for the district in which that offence was committed by Freeland & Smiths. The respondents had refused to take proceedings against Freeland & Smiths in reference to that offence although requested by the appellants to take such proceedings. The appellants had on July 29, 1913, passed a resolution to the effect

1915

LONDON COUNTY COUNCIL v. BERMONDSEY BOROUGH COUNCIL.

that it had been proved to their satisfaction that the respondents as sanitary authority had made default in doing their duty under the Act in failing to take such proceedings. The appellants had thereafter instituted proceedings against Freeland & Smiths in respect of such offence, which had been successful and resulted in the said conviction. The expenses incurred by the appellants in and about such proceedings which had not been recovered from any other person amounted to 15*l.* 15*s.* The penalty imposed upon Freeland & Smiths had been received by the respondents.

The appellants contended that under the Public Health (London) Act, 1891 (1), and in particular under s. 1 and ss. 99 et seq., it was the duty of the respondents to enforce the

(1) 54 & 55 Vict. c. 76:—

Sect. 1: "It shall be the duty of every sanitary authority to cause to be made from time to time inspection of their district, with a view to ascertain what nuisances exist calling for abatement under the powers of this Act, and to enforce the provisions of this Act for the purpose of abating the same, and otherwise to put in force the powers vested in them relating to public health and local government, so as to secure the proper sanitary condition of all premises within their district."

Sect. 19: "(1.) If any person—

"(*a*) establishes anew the following businesses, or any of them, that is to say, the business of blood boiler, bone boiler, manure manufacturer, soap boiler, tallow melter, or knacker; . . . .

he shall be liable to a fine . . . .

"(4.) The county council may make byelaws for regulating the conduct of any businesses specified in this section, which are for the time being lawfully carried on in London, and the structure of the premises on which any such business is being carried on, and the mode in which the said application is to be made."

Sect. 100: "The county council, on it being proved to their satisfaction that any sanitary authority have made default in doing their duty under this Act with respect to the removal of any nuisance, the institution of any proceedings, or the enforcement of any byelaw, may institute any proceeding and do any act which the authority might have instituted or done for that purpose, and shall be entitled to recover from the sanitary authority in default all such expenses in and about the said proceeding or act as the county council incur, and are not recovered from any other person, and have not been incurred in any unsuccessful proceeding."

Sect. 119: "(1.) All fines recovered under this Act shall, notwithstanding anything in any other Act, be paid to the sanitary authority and applied by them in aid of their expenses in the execution of this Act, except that any fine imposed on the sanitary authority shall be paid to the county council."

provisions thereof and to institute the proceedings under s. 19 against Freeland & Smiths. The respondents contended that the only authority upon whom powers are conferred by s. 19 are the appellants; that no power is conferred upon the respondents by s. 19 or by any other section of the Act to take proceedings against any person committing an offence under sub-s. 1 (*a*) or (*b*) of s. 19; that throughout the Act in all cases in which a duty is laid upon the sanitary authority to take proceedings under the Act such duty is specifically imposed upon it; that by s. 6, sub-s. 4, of the London Government Act, 1899, the duty of enforcing the by-laws and regulations with respect to offensive businesses made by the appellants under s. 19 of the Act of 1891 was imposed for the first time upon sanitary authorities; and that, as no power is conferred and no duty imposed upon sanitary authorities by s. 19 to take proceedings for offences under that section, there was no default by the respondents "in doing their duty under this Act" within the meaning of s. 100.

The magistrate was of opinion that the respondents had not made default in doing their duty within s. 100 of the Public Health (London) Act, 1891, and therefore dismissed the summons. A copy of his judgment was made part of the case.

Macmorran, K.C., and *Rowsell*, for the appellants.
Bodkin, for the respondents.
The arguments appear fully from the judgments.

LORD READING C.J. The question raised in this case is whether the London County Council can recover the balance of expenses incurred by them in the prosecution of Freeland & Smiths for contravening the provisions of the Public Health (London) Act, 1891, s. 19. The county council instituted the proceedings, which were successful, and a sum was awarded, payable by the respondents to the summons, for costs. That sum only represented part of the expenses which had been incurred by the county council, and they thereupon proceeded, under s. 100 of the Act of 1891, to recover the balance of these expenses. The

1915

LONDON COUNTY COUNCIL v. BERMONDSEY BOROUGH COUNCIL.

Lord Reading C.J.

case put on behalf of the county council was that the borough council had made default, inasmuch as they were the sanitary authority charged under the Act of 1891 with the duty of enforcing the provisions of that Act, at any rate in relation to s. 19; that they had failed, notwithstanding that a complaint had been made to them by the county council, to institute the proceedings; and, consequently, the county council, finding that the borough council refused to prosecute and, in the view of the county council, to carry out the duty imposed upon the borough council, themselves instituted these proceedings and claimed to recover under s. 100.

The magistrate held that the county council could not recover, upon the ground that there is nowhere to be found in the statute the duty imposed upon the borough council to institute the proceedings. It was further argued that there were no express words imposing this obligation upon the borough council, and there was, therefore, no specific duty upon them; that s. 100 only applied where there was the specific duty imposed by express words in the statute; and that, therefore, in any event s. 100 did not apply to this case.

In my view, the decision in this case must turn upon whether or not we come to the conclusion that there was a duty imposed upon the borough council to enforce the provisions of s. 19. I cannot myself appreciate the reason for holding that s. 100 might and would apply to a specific duty, or a duty created by express words, and would not apply to a duty which arose by implication from the language of the statute. It seems to me we must construe the words of the Act and are not entitled to look beyond those words. It is true that this is a consolidating and amending statute, but nevertheless we have to interpret the language of this Act. Sect. 100 provides: [His Lordship read the section.] I find there no words limiting the meaning of "duty." The whole question seems to me to be whether the borough council, which is the sanitary authority by virtue of the subsequent statute of 1899, have made default in doing their duty imposed by statute upon them as the sanitary authority to enforce the provisions of s. 19 of this statute. I have come to the conclusion, after much consideration, that this duty is imposed upon the sanitary authority. It is not to be found in express words in the

statute, and to that extent Mr. Bodkin makes good his argument. It is not contended by the appellants that there are any specific words which impose this obligation upon the sanitary authority; but it is contended that, looking at certain sections of the Act and viewing the statute as a whole, and bearing in mind its object, we ought to come to the conclusion that the duty is imposed, and I assent to that argument. Under s. 1 it is the duty of every sanitary authority "to put in force the powers vested in them relating to public health and local government." Now, if the words stopped there, I think there could be no doubt in this case, and no difficulty could arise; but there follow the words "so as to secure the proper sanitary condition of all premises within their district," and Mr. Bodkin has addressed to us cogent arguments for limiting the meaning attributable to the language of this section because of those concluding words. He contends that, although no doubt there is a duty to put in force the powers relating to public health so as to secure the proper sanitary condition of all premises within their district, yet s. 1 cannot apply to s. 19, because s. 19 is a section dealing with and prohibiting the establishing anew of certain offensive businesses and giving a power to make regulations for the conduct of specified businesses, and it does not follow at all that such a business is a nuisance, and that s. 1 was only intended to apply to nuisances. That is perfectly true as regards the first part of s. 1, but I do not think that it is correct with regard to the latter part of the section, and I construe the words, "otherwise to put in force the powers vested in them relating to public health," to the end of the section, as meaning that the obligation is imposed upon the sanitary authority to carry out the powers of that Act, and I come to the conclusion that the words must be construed as having a wider import than Mr. Bodkin's argument would allow. In my opinion they are not confined merely to those cases in which a nuisance may be said to exist, but are sufficiently wide to cover the case of premises being used for the purpose of carrying on offensive trades. The words "so as to secure the proper sanitary condition" there used do not relate only to drains, sewers, privies in the building, and so forth, or to nuisances on the premises, but they mean (particularly taking them in conjunction

1915

LONDON COUNTY COUNCIL v. BERMONDSEY BOROUGH COUNCIL.

Lord Reading C.J.

with the later sections to which I will refer) that the duty is imposed upon the sanitary authority to see that the premises are kept in sanitary condition. That is the object of those words. I understand by that, not merely that they should be cleaned, or that the drainage should be kept in proper order, but that, for the public health, the sanitary condition should be such as is prescribed by the statute. I think the very object of s. 19 was to enforce a sanitary condition within the district by giving power to prevent the establishing anew of offensive trades for the preservation of the public health, and that therefore it comes within the object of the statute as expressed by the last words of s. 1. The provisions of sub-s. 3 of s. 107 also assist in that view. It may be that, taking each of these sections separately, there is a difficulty in finding the duty actually imposed; but looking at the words of s. 1 and of s. 107, sub-s. 3, it appears to me that it was intended not only to impose the duty upon the sanitary authority, but also to charge the local inspector with the duty, subject to any direction of the sanitary authority, to make complaints before justices and take legal proceedings for the punishment of any person for any offence under the Act or by-laws. Reference to s. 119, which enacts that the fines recovered under the Act shall be paid to the sanitary authority and applied by them in aid of their expenses in the execution of this Act, again helps to confirm this view.

I do not rest my decision upon any one of these sections singly, but, taking these sections together, it seems to me that the only reasonable view to take is that the Legislature intended to impose this duty upon the sanitary authority. If it were otherwise, the result seems to be that it is open to the borough council to institute proceedings as it is open to any member of the public, but that there is no duty imposed upon them. If it is merely a right which the council or the public can enforce, one must assume from general experience that it is extremely unlikely that a member of the public will institute the proceedings, having regard to the liabilities which he would incur. If it is left optional to the borough council, the result will be that, although there may be an offensive trade carried on in defiance of the provisions of the Act, it is nobody's duty to institute

proceedings. It is not the duty of the county council. The county council may, after it has called the attention of the borough council to the default, institute the proceedings if it chooses, but it certainly is not obligatory upon the county council to do so. If the county council comes to the conclusion, as it did in this case, that proceedings ought to be instituted to enforce the Act, and incurs expense in doing so, the result, if we accept the magistrate's decision, would be that the county council, although successful in the prosecution, would have incurred expense which it could never recover, and the fine which it was the means of recovering would be paid to the borough council to help the borough council to carry out the Act which it had failed to carry out. That seems to me to lead to an unreasonable result, and unless I felt impelled by the words of the statute I certainly should not come to that conclusion. Having regard to the sections to which I have directed attention, and also to s. 19 under which the offence was committed, I think the magistrate was wrong.

I ought to notice the argument for the respondents, which impressed me at one time very considerably, that as by sub-s. 4 of s. 6 of the London Government Act, 1899, the duty was imposed upon the borough council to enforce within their borough the by-laws and regulations for the time being in force with respect to offensive businesses, we ought to come to the conclusion that Parliament had not intended before that Act to impose the duty upon the sanitary authority of enforcing the by-laws and regulations made under the Act of 1891, and that, as the Act of 1899 had only provided for the enforcement of the by-laws and regulations, and had not enacted that it was the duty of the borough council to enforce the statutory provisions, therefore Parliament cannot have intended to impose the duty for which the county council now contends. I thought there was great force in that, but upon consideration I am not satisfied that under the statute of 1891, apart altogether from that of 1899, there may not have been a duty upon the borough council to enforce the by-laws and regulations. It is, however, unnecessary to decide that, because I think that the provisions of the Act of 1891, taken in conjunction with the section of the Act of 1899 to which I have referred, all seem to point to the

1915

LONDON COUNTY COUNCIL v. BERMONDSEY BOROUGH COUNCIL.

Lord Reading C.J.

intention of Parliament to impose the duty on the borough council to carry out the particular provisions of s. 19. It might well be that there was a doubt as to whether they had the duty to enforce the by-laws and regulations which were to be made by the county council under sub-s. 4 of s. 19, and that therefore it was necessary to declare it in express terms by the Act of 1899; but that does not satisfy me by any means that there was no duty on the sanitary authority to enforce the statutory provisions without reference to the Act of 1899 at all.

I therefore have come to the conclusion that the magistrate was wrong, and that although one cannot find any duty expressly imposed upon the sanitary authority to institute these proceedings, the duty is by implication imposed upon them, and that they have made default in carrying out that duty, and that consequently s. 100 applies and the county council are entitled to recover. This appeal must be allowed.

RIDLEY J. concurred.

AVORY J. I am of the same opinion. It seems to be clear that the magistrate in this case proceeded upon the view that the word "duty," in s. 100 of the Public Health (London) Act, 1891, must be construed as meaning an express or specified duty which is to be found in some section of the Act. In that I think he was wrong. I think the word "duty" clearly applies to an implied duty as well as to one which is actually expressed. I would only add to what has already been said by my Lord, in which I fully concur, that s. 99 is followed by s. 100, and s. 99 clearly contemplates in broad, general terms that the sanitary authority are to be the body responsible for the execution of the Act. I do not think that s. 99 is intended to be a mere definition of who the different bodies are to be, but that it contemplates by its very words that the sanitary authority of the particular district are to be the body responsible for the execution of the Act.

Appeal allowed.

Solicitor for appellants: *Edward Tanner.*

Solicitor for respondents: *Frederick Ryall.*

J. H. W.

[IN THE COURT OF APPEAL.]

C. A.

1915

May 19, 20; *June* 11.

THE KING *v.* CARSON ROBERTS. *Ex parte* MAYOR, &c., OF STEPNEY.

Rates—Rating of Owner—Commission allowed to Owner—"Dwelling-house or tenement"—"Wholly let out in apartments or lodgings"—Part of House let as Office and Workshop—Representation of the People Act, 1867 (30 & 31 *Vict. c.* 102), *s.* 7—*Poor Rate Assessment and Collection Act*, 1869 (32 & 33 *Vict. c.* 41), *s.* 3.

Two houses in a parliamentary borough were let out in different rooms, which, at the date of the passing of the Representation of the People Act, 1867, were not separately rated. One room in one of the houses was used as a workshop, and one room in the other house was used as an office; the remaining rooms in each house were let and used as dwelling-houses:—

Held, that neither of the houses was a "dwelling-house . . . . wholly let out in apartments or lodgings" within the meaning of the exception clause in s. 7 of the Representation of the People Act, 1867, and therefore that the rating authority were entitled under s. 3 of the Poor Rate Assessment and Collection Act, 1869, to receive the rates in respect of the hereditaments from the owners and to allow them a commission on the amount thereof where such owners agreed in writing to become liable for the rates and to pay the same whether the hereditaments were occupied or not.

Decision of the Divisional Court [1915] 1 K. B. 110 affirmed.

Appeal from the decision of a Divisional Court (Lord Coleridge, Horridge, and Shearman JJ.) (1) whereby they made absolute a rule nisi directed to A. Carson Roberts, district auditor appointed by the Local Government Board to audit the accounts of the metropolitan borough of Stepney (which forms part of the parliamentary borough of the Tower Hamlets), to show cause why a writ of certiorari should not issue to remove into Court certain disallowances and surcharges made by him as such auditor, on the ground that he acted contrary to law in making the said disallowances and surcharges.

The disallowances and surcharges were made under the following circumstances.

The Stepney Borough Council, on October 1, 1912, duly made

(1) [1915] 1 K. B. 110.

C. A. 1915

REX v. CARSON ROBERTS. STEPNEY CORPORATION, *Ex parte.*

a general rate for the parish of Whitechapel, and the rate was allowed by two justices. In respect of two houses—40, Newcastle Street and 21A, Leman Street—each comprising several hereditaments separately assessed and rated, the owners paid the rates subject in each instance to a deduction of 20 per cent. from the full amount of the rate in pursuance of the provisions of the Poor Rate Assessment and Collection Act, 1869, and of agreements in writing made between the owners and the borough council under s. 3 of the Act, by which the owners agreed to become liable for the payment of the rates assessed in respect of the said hereditaments whether occupied or not.

The premises known as 40, Newcastle Street consisted of a dwelling-house which was let out in different rooms as dwelling-houses, with the exception of one room on the second floor, which was used as a workroom and registered as a workshop, not more than six persons being allowed to be employed in it at the same time.

No. 21A, Leman Street was similarly let out to different tenants, all the rooms being used as dwelling-houses with the exception of one room on the ground floor, which was used as an office.

At the audit of the accounts of the borough council for the year ending March 31, 1913, Mr. Roberts disallowed the sum of 1*l.* 4*s.* 2*d.* in respect of 40, Newcastle Street, and the sum of 1*l.* 1*s.* 8*d.* in respect of 21A, Leman Street, and surcharged these amounts upon a member of the council and the town clerk on the ground that each of the houses in question was "a dwelling-house wholly let out in apartments or lodgings" within the meaning of the exception clause in s. 7 of the Representation of the People Act, 1867, and therefore a hereditament to which s. 3 of the Poor Rate Assessment and Collection Act, 1869, could not lawfully be applied.

The auditor's certificate stated, in respect of each house, that "the parts in which the house in question is let out were not separately rated at the time of the passing of the Representation of the People Act, 1867."

The Divisional Court held that neither of the houses was a "dwelling-house or tenement wholly let out in apartments or

lodgings," and that the borough council were entitled to make the allowance to the owners. The rule was accordingly made absolute.

The district auditor appealed.

Clavell Salter, K.C., and *E. M. Konstam*, for the appellant. For the purposes of the borough franchise, ss. 3 and 4 of the Representation of the People Act, 1867, gave the franchise to a man who was an inhabitant occupier of a dwelling-house or lodgings, the basis taken being that of residential occupation, but for rating purposes the Act took beneficial, and not residential, occupation as the basis. By s. 7, the liability of the owner of a dwelling-house or tenement in a borough to be rated to any future poor rate was to cease and was transferred from him to the occupier, but this was not to apply to the owner of a dwelling-house or tenement wholly let out in apartments or lodgings not separately rated, and it was held in *White and Hales* v. *Islington Corporation* (1) that where a dwelling-house or tenement was so let at the time of the passing of the Act of 1867, the owner must be rated to the full amount of the poor rate without any deduction, and could not claim the exemption contained in ss. 3 and 4 of the Poor Rate Assessment and Collection Act, 1869. That case shows that the earlier Act was not overriden by the provisions of the Act of 1869.

The subject-matter of the provisions of s. 7 of the Act of 1867 is not only residential but also non-residential structures, and the rule applied by the section is based on beneficial occupation and is not limited to residential occupation. The Legislature has been at pains to introduce into s. 7 the words "or other tenement" so as to include non-residential structures, and those words do not occur in the earlier 3rd and 4th sections in relation to the borough franchise. The word "apartments" is used in contradistinction to, and not as synonymous with, "lodgings," and the Divisional Court was wrong in construing those words as mere tautology. "Apartments" means any section of a tenement or structure let for the exclusive occupation of a person, and would for instance include and apply to any section

(1) [1909] 1 K. B. 133.

C. A. 1915

REX v. CARSON ROBERTS. STEPNEY CORPORATION, *Ex parte.*

of a garage or, in a three-stall stable, to each stall let out to a separate person.

The Oxford Dictionary defines "apartment" as "(1.) A portion of a house or building, consisting of a suite or set of rooms, allotted to the use of a particular person or party," and "(2.) A single room of a house; the original sense being expressed by the plural *Apartments*." Sect. 5 of the Parliamentary and Municipal Registration Act, 1878, defines "lodgings" as including "any apartments or place of residence, whether furnished or unfurnished, in a dwelling-house," and the use by the Legislature of the words "dwelling-house" and "apartments" when defining the meaning of "lodgings" helps our contention. Here we have the words "dwelling-house or tenement" and the words "apartments or lodgings," and the Legislature cannot have meant that "apartments" should have the same meaning as "lodgings," and must have intended it to mean any section or portion of a house or tenement. The word also occurs in sub-s. 1 (*a*) of s. 211 of the Public Health Act, 1875, and is used there, we submit, as meaning a section or portion of the "premises" in question.

It was held in *Daniel* v. *Coulsting* (1) that a building calculated to be used as a dwelling-house though not used as such is properly described as a "house," and when you speak of apartments in a house you do not necessarily infer sleeping therein.

Dealing with the question from the point of view of the franchise, if the appellant's contention be not right, then a change in user by the occupier of a single room in a house which is let out in separate rooms may have the effect of disfranchising all the other occupiers, or, vice versa, it may enfranchise them all. The Court is not driven to adopt a construction which would have that effect. The use to which a room is put is not material. The words are "let out in" and not "let for" this or that purpose. The title of the occupants to the franchise cannot depend upon whether the landlord's intention is or is not carried out by his tenants.

Then as to rating, if the decision of the Divisional Court be allowed to stand great difficulty will be experienced by the rating authorities, this being a class of hereditament which gives

(1) (1845) 7 Man. & G. 122.

rise to considerable difficulty and expense. The decision in *White and Hales* v. *Islington Corporation* (1) was very valuable from that point of view and ought not to be whittled away. The intention of the Legislature was that the rating officer need do no more than ascertain whether the building is a tenement house. The Act was passed with the object of simplifying rating and avoiding expense and difficulty therein. It would be a remarkable result if the change of user of a single room in a tenement house should alter the whole position with regard to rating. If one room were vacant the rating authorities would be unable to classify the property. [They also referred to *St. Marylebone Assessment Committee* v. *Consolidated London Properties* (2) and *Grant* v. *Langston.* (3)]

Macmorran, K.C., and *E. J. Naldrett*, for the respondents. These houses are not "wholly let out in apartments or lodgings" and therefore do not come within the exception to s. 7 of the Representation of the People Act, 1867. The word "tenement" means something ejusdem generis with the word "dwelling-house," and the words "apartments" and "lodgings" substantially mean the same thing. The words "tenement" and "apartments" were probably inserted in the Act by way of extra caution and were not intended to indicate that something other than a dwelling-house or something other than separate residential rooms were intended to be brought within the exception. Where part of a house is let for a non-domestic purpose it cannot be said that the house is wholly let out in apartments or lodgings. The two terms are synonymous—Crabb's English Synonyms, 8th ed. (1846), p. 547—and imply residence and not business occupation. [They referred to *Griggs* v. *Stevens* (4), *Dashwood* v. *Ayles* (5), and *Stamper* v. *Sunderland Overseers.* (6)]

Salter, K.C., in reply. *White and Hales* v. *Islington Corporation* (1) may be right or wrong, but it is binding on this Court and ought not to be cut down.

In *Bradley* v. *Baylis* (7) a lodger is defined as one who lives in

(1) [1909] 1 K. B. 133.
(2) [1914] A. C. 870.
(3) [1900] A. C. 383.
(4) (1909) 74 J. P. 67.
(5) (1885) 16 Q. B. D. 295.
(6) (1868) L. R. 3 C. P. 388.
(7) (1881) 8 Q. B. D. 195.

C. A. 1915

REX v. CARSON ROBERTS. STEPNEY CORPORATION, *Ex parte*

part of a house controlled by his landlord. Both "dwelling-house" and "lodgings" are essentially residential. Sect. 7 is not confined to dwelling-houses, but extends to tenements which are not dwelling-houses.

Cur. adv. vult.

LORD COZENS-HARDY M.R. This appeal turns solely upon the true construction of a few words in s. 7 of the Representation of the People Act, 1867. The primary object of that Act, as the title shows, was to deal with the franchise, but at the same time it altered the law of rating. By s. 3 a vote was given in boroughs to every inhabitant occupier of a "dwelling-house," which includes part of the dwelling-house. By s. 4 a lodger franchise was created in boroughs dependent partly upon the value of the dwelling-house. The franchise in s. 3 is dependent on the inhabitant occupier being rated to the poor rate. There were under some general Acts, and under many local Acts, provisions under which the owner, and not the occupier, was rated, and the effect of those Acts was, or might have been, to deprive inhabitant occupiers of the franchise which Parliament intended to confer by s. 3. It was therefore enacted by s. 7, which applies only to boroughs, that the liability of the owner of a dwelling-house to be rated, instead of the occupier, should cease. But there is one exception. Where "the dwelling-house or tenement shall be wholly let out in apartments or lodgings not separately rated the owner of such dwelling-house or tenement shall be rated in respect thereof to the poor rate." One of the main objects of this exception was, I think, to prevent occupiers, of what may be called tenement houses, from claiming the vote as occupiers when they might more naturally be regarded as persons who ought to claim as lodgers. But however that may be, the language of the exception seems to me to point to domestic use and occupation and not to a mere structural division of a dwelling-house into several rooms.

The only difficulty is because of the words "dwelling-house or tenement" and "apartments or lodgings." As to the former, I think the words "dwelling-house or tenement" are intended

to describe the same thing. It is plain that some limitation must be put upon the very general word "tenement." It must at least be something capable of being let out in lodgings or apartments. The use of the phrase "messuage or tenement" is common and I think "dwelling-house or tenement" must mean neither more nor less than "dwelling-house."

But then it is said the words "apartments or lodgings" mean different things, and that "apartments" refer only to the structure of the building irrespective of its use. I think this is not accurate. The words are "wholly let out in apartments or lodgings." There is high authority for the use, long before 1867, of the word apartments as applied to lodgings. I may refer to the great case of "Bardell *v.* Pickwick" and to the experience which all of us must have had of notices in the windows of places at the seaside. Upon the whole I think that the proviso only applies to a dwelling-house wholly let out in apartments or lodgings, and that it has no application where part of the dwelling-house is let out and used as a workshop, or where part of the dwelling-house is used as an office. This being so, I think the view taken by the Divisional Court was correct and that the occupier and not the owner must be rated in respect of the dwelling-houses in question.

It may be that the precise point has not come up for decision before the present case, but the observations of Vaughan Williams L.J. and Buckley L.J. in *White and Hales* v. *Islington Corporation* (1) seem to me strongly to support this view, and I am not aware of any dictum to the contrary. The appeal must be dismissed with costs.

BANKES L.J. This is an appeal from a decision of the Divisional Court which raises the question as to the true construction of the exception contained in s. 7 of the Representation of the People Act, 1867. The exception provides that where the dwelling-house or tenement shall be wholly let out in apartments or lodgings not separately rated the owner of such dwelling-house or tenement shall be rated in respect thereof to the poor rate. The appellant contends that the word "tenement" must be read

(1) [1909] 1 K. B. 133.

C. A. 1915

REX v. CARSON ROBERTS. STEPNEY CORPORATION, *Ex parte*.

Bankes L.J.

as meaning something other than a dwelling-house, and the word "apartments" as something other than "lodgings," and as including single rooms whether used for habitation or for business purposes. The respondents contend that the word "tenement" and the word "apartments" were inserted by the draftsman as a matter of caution, and not for the purpose of indicating that something other than a dwelling-house, or anything other than separate rooms used for inhabitant occupation, were intended to be included in the exception. The words are probably capable of either construction. The appellant's counsel called attention to the difficulties and inconveniences which could have arisen after the passing of the Act had the construction sought to be put upon the Act by the respondents been adopted. I am not impressed by that argument. It assumes that the draftsman foresaw all those difficulties. I am not prepared to assume that he did. On many points the Act has required amendment, and later legislation has removed practically all the difficulties which Mr. Salter indicated. This later legislation, however, has not touched the question raised in the present case, which is whether the owner of premises occupied as these premises are occupied is compellable to pay the rates without any allowance. In my opinion the key to the proper construction of the exception is to be found in a consideration of the purpose for which the Act was passed and the purpose for which the exception was inserted.

In *Stamper* v. *Overseers of Sunderland* (1) Bovill C.J. says this: "In considering what is the right interpretation of the exception, it is necessary to look at the other parts of the same section, to bear in mind the general scope and objects of the Act, and to consider the exception with reference to the various other provisions which are contained in the Act." The actual point for decision in that case was not the same as in the present case, but the language of the Chief Justice is just as applicable to the present case as to that one.

In the case of *White and Hales* v. *Islington Corporation* (2) Buckley L.J. deals with the object of the Act where he says: "That was an Act whose primary object was to make alterations

(1) L. R. 3 C. P. at p. 395. (2) [1909] 1 K. B. at p. 149.

in the franchise. The Act by s. 3 created a franchise dependent upon qualification by (first) occupation, and (secondly) payment of rates in respect of the premises occupied. The Act also effected alterations in rating. These are no doubt to be read as introduced for the purpose of giving fuller effect to the franchise created. A purpose, and perhaps the main purpose, of s. 7 was under the circumstances to make the occupier, and not the owner, rateable in the cases to which the section applied, with a view to enlarging the area of the new franchise by clothing occupiers who were not theretofore rateable with the qualification of rateability. But it is erroneous, I think, to describe the Act as a franchise Act and not a rating Act. It is a franchise Act and consequently a rating Act. It is a franchise Act for whose larger effect alteration was made in the law of rating, and thus was also a rating Act." With this view of the object of the Act and of the section I entirely agree. In both those cases the reason for the insertion of the exception in s. 7 was considered, and I would call attention particularly to what was said on this point by Vaughan Williams L.J. in *White and Hales* v. *Islington Corporation* (1) and by Montague Smith J. in *Stamper* v. *Overseers of Sunderland.* (2) Both learned judges point out that the exception was inserted in order to prevent lodgers with an insufficient qualification under s. 4 of the Act claiming the franchise as inhabitant occupiers under s. 3. If this view of the exception is adopted, it almost necessarily follows that the construction put upon the exception by the respondents is the proper one to adopt. It is certainly the one adopted by the learned judges in both these cases who deal with the particular point. Montague Smith J. certainly adopts it in the passage in his judgment on p. 403, where he is dealing with the intention of the Legislature. Vaughan Williams L.J. certainly adopts it at p. 147 of his judgment, where he uses this language: "I think that this provision in s. 7 of the Act of 1867 which we are dealing with means that, if the relation at the time of the passing of the Act of 1867 subsisting between the owner of a dwelling-house or tenement and the lessee of apartments or lodgings was such that the apartments or lodgings were not

(1) [1909] 1 K. B. at p. 147. (2) L. R. 3 C. P. 388, at p. 403.

C. A. 1915

REX v. CARSON ROBERTS. STEPNEY CORPORATION, *Ex parte*.

Bankes L.J.

separately rated, the owner and not the occupiers of the part of a house constituted a dwelling-house by the definition in s. 61 should be rated to the poor." Buckley L.J. puts the point even more clearly at p. 151, where he says: "Sub-clause 1, and the words which follow sub-clause 2 then, in my opinion, have this effect, that no owner of a dwelling-house in any borough in England shall be rated instead of the occupier except where the tenement shall be wholly let out in apartments and such apartments are not separately rated." It is clear that in both those cases the learned judges treated "dwelling-house" and "tenement" and "apartments" and "lodgings" as interchangeable expressions and for the purpose of construing the exception as conveying the same meaning. In this view I agree, and I think that the decision of the Divisional Court should be affirmed and this appeal dismissed.

WARRINGTON L.J. The question in this case is whether the rating authority were justified in rating the occupiers of rooms, or sets of rooms, in two small houses in Whitechapel, within the parliamentary borough of the Tower Hamlets, or whether they should in accordance with s. 7 of the Representation of the People Act, 1867, have rated the owners of the two houses. Having rated the occupiers of the rooms, or sets of rooms, the authority, pursuant to the Poor Rate Assessment and Collection Act of 1869, s. 3, made with the owners an agreement that they should pay the rates and allowed them the commission of 20 per cent. The auditor has disallowed this commission, the Divisional Court has overruled the disallowance, and the auditor appeals.

Each house is let out in rooms, or sets of rooms, the tenants enjoy in common the staircases and conveniences, the owner retains in his own hands no part of the house. In each house one room is not used for residential purposes. In the one case it is a workshop, duly registered as such, in the other case it is a builder's office.

The question turns on the true construction and effect of a few words in s. 7 of the Representation of the People Act, 1867.

The Act, as is well known, created for the first time a household franchise in boroughs. Stated shortly, the qualification of

a voter under this Act is that he be an inhabitant occupier of a dwelling-house in the borough, that he be rated as an ordinary occupier of the premises occupied by him, and that he has duly paid the rates.

In order apparently to ensure that the occupier of a dwelling-house should not lose the franchise from not being rated to the poor, under one or other of certain public and local Acts then in force, it was provided by s. 7, sub-s. 1, that "no owner of any dwelling-house or other tenement situate in a parish either wholly or partly within the borough shall be rated to the poor rate instead of the occupier except as hereinafter mentioned." The exception is in the following terms: "Where the dwelling-house or tenement shall be wholly let out in apartments or lodgings not separately rated the owner of such dwelling-house or tenement shall be rated in respect thereof to the poor rate."

It has been determined that the words "not separately rated" mean not so rated at the date of the passing of the Act: see *Stamper* v. *Sunderland Overseers.* (1)

It is common ground that the rooms, or sets of rooms, in the houses in question were not separately rated. The question then turns upon the true meaning of the words "wholly let out in apartments or lodgings." The appellant contends that the house is so let out for whatever purpose the rooms are used. The respondents say that it is only so let out if the rooms are used for residential purposes and that the houses in question therefore do not fall within the description contained in the exception to the provision of s. 7, sub-s. 1, owing to the fact that some of the rooms are not so used. In my opinion the respondents' view is correct. There can, I think, be no doubt that long before 1867 the word "apartments" in the plural had come to be commonly used in connection with the verb "to let" as the more genteel term for the thing that in good English was called "lodgings." In a famous book written in the thirties of the last century both terms are used within a few lines of each other. "Apartments furnished for a single gentleman" were the terms of the bill placed in the window announcing the accommodation offered. The accommodation itself is described as "lodgings." It must

(1) L. R. 3 C. P. 388.

C. A. 1915

REX v. CARSON ROBERTS. STEPNEY CORPORATION, *Ex parte.*

Warrington L.J.

also be in the memory of many of us that in our early youth, and before 1867, the term used in seaside towns was invariably "apartments." I feel no doubt that the words "apartments" or "lodgings" are used in this statute as synonyms for the same thing. The draftsman may have used the two words in order to prevent any technical meaning connected with the lodger franchise created by the same statute being given to the word "lodgings" if it had been used by itself.

Some difficulty is no doubt caused by the use of the expression "dwelling-house or tenement," but here again I think the word "tenement" is not used in contradistinction to dwelling-house any more than it is used in contradistinction to "messuage" in many conveyances containing the expression "messuage or tenement" where "messuage" alone, or "tenement" alone, would have been sufficient. In this section "tenement" must have some limitation placed upon it inasmuch as the context shows that it must be at all events capable of being wholly let out in apartments or lodgings. I think the expression "dwelling-house or tenement" is a tautological expression.

Moreover the object of the statute in which the expression occurs has some bearing on its true construction. It created a residential franchise so far as boroughs are concerned, and it seems difficult to understand why a provision confined to boroughs and apparently intended to prevent this franchise from being acquired by the occupiers of apartments or lodgings in a house wholly let out for that purpose should be so construed as to extend to premises let out for purposes other than residential. On the whole I am of opinion that the decision of the Divisional Court was correct, and ought to be affirmed.

Appeal dismissed.

Solicitors: *Last, Sons & Fitton; Alfred Turner.*

G. A. S.

ARLIDGE, Appellant *v.* SCRASE, Respondent.

1915
June 22.

Housing of the Working Classes—Preventing Medical Officer from entering—Right of Entry for Survey and Examination—"Provisions of this part of this Act"—Housing of the Working Classes Act, 1890 (53 & 54 *Vict. c.* 70), *s.* 51—*Housing, Town Planning, &c., Act*, 1909 (9 *Edw.* 7, *c.* 44), *ss.* 36, 47, 76.

By s. 51, sub-s. 1, of the Housing of the Working Classes Act, 1890, which is called the principal Act, if any person being the owner of any dwelling-house prevents the medical officer of health from carrying into effect with respect to the dwelling-house "any of the provisions of this part"—i.e., Part II.—"of this Act" after notice of intention so to do, a Court of summary jurisdiction may order such person to permit to be done on the premises all things requisite for carrying into effect with respect to the dwelling-house "the provisions of this part of this Act." By sub-s. 2, if at the expiration of ten days after service of the order such person fails to comply therewith he is liable to a penalty.

By s. 77, which is included in Part IV., headed "Supplemental," of the same Act, any person authorized by the local authority may in certain cases and under certain conditions enter any dwelling-house for the purpose of surveying and valuing the same. This section was repealed by the Housing, Town Planning, &c., Act, 1909, and replaced by s. 36, which is contained in Part I. of that Act under the heading "General Amendments," and enacts that any person authorized as therein prescribed by the local authority may at all reasonable times on giving twenty-four hours' notice enter any house . . . . (*c*) for the purpose of survey and examination where it appears to the authority that survey or examination is necessary in order to determine whether any powers under the Housing Acts should be exercised in respect of any house.

By s. 47, sub-s. 1, of the Act of 1909 it is enacted that any of the provisions of that Act which supersede or amend any provisions of the principal Act shall be deemed to be part of that part of the principal Act in which the provisions superseded or amended are contained.

By s. 76 of the Act of 1909 it is enacted that Part I. of that Act shall be construed as one with the principal Act and other Acts:—

Held, that the effect of this legislation was to make s. 36 (*c*) of the Act of 1909 part of Part II. of the principal Act, and that the owner of a house who prevented the medical officer of health from entering the house for purposes of survey and examination under s. 36 (*c*) of the Act of 1909 was liable under s. 51 of the principal Act to be ordered by a Court of summary jurisdiction to permit the medical officer to enter the house for the purposes aforesaid.

Case stated by a metropolitan magistrate.

On January 9, 1915, an information was preferred by the respondent, Frank Edward Scrase, described as the medical

1915

ARLIDGE v. SCRASE.

officer of health for the metropolitan borough of Hampstead, against the appellant for that the appellant being the owner of a certain dwelling-house, No. 84, Palmerston Road, in the said borough unlawfully did prevent the respondent from carrying into effect with respect to the said dwelling-house certain provisions of Part II. of the Housing of the Working Classes Act, 1890, to wit, from entering the said dwelling-house for the purpose of survey and examination as provided by s. 36 (*c*) of the Housing, Town Planning, &c., Act, 1909, after notice of intention so to do had been duly given to him in accordance with the said Acts.

A similar complaint was made with reference to the dwelling-house No. 85, Palmerston Road.

Informations were also preferred by the respondent against the appellant for unlawfully obstructing the respondent in the performance of an act which he was required or authorized to do, namely, to enter the said premises for the purpose of survey and examination as provided by s. 36 (*c*) of the Housing, Town Planning, &c., Act, 1909, and contrary to s. 89 of the Housing of the Working Classes Act, 1890.

Other informations both for preventing and for obstructing were preferred by an officer of the respondent and by a workman employed by the respondent with reference to each of the dwelling-houses named above.

The summonses were all heard together, and the appellant was convicted of all the offences charged. The magistrate stated a case which set out the facts and the arguments on each side.

With regard to all the summonses counsel for the appellant admitted that the officers and servant of the local authority were in fact prevented from and obstructed in entering the houses by the tenants thereof; but he contended that the prevention and obstruction were not with the knowledge and assent of the appellant. The Court held that there was evidence on which the magistrate could find that the obstruction and prevention took place with the appellant's knowledge and assent. The case is not thought to be worth reporting upon this point.

Counsel for the appellant then took the point that no facts were stated in the case to show that it had appeared to the local authority that a survey or examination of the premises was necessary. There was set out in the case a resolution passed by the local authority that the medical officer of health, the senior sanitary inspector, and one Wallace Tidd, a carpenter, should be authorized to enter the premises known as 84 and 85, Palmerston Road for the purpose of survey and examination. The Court held that this was ample evidence that survey and examination appeared to the authority to be necessary. Upon this point also the case does not seem to be worth reporting.

Upon the convictions for preventing the following enactments were cited:—

The Housing of the Working Classes Act, 1890 (53 & 54 Vict. c. 70), contained in Part II., headed "Unhealthy Dwelling-houses," sections numbered 29 to 52 inclusive. Sect. 32 under the sub-heading "Closing Order and Demolition" was as follows:

"(1.) It shall be the duty of every local authority to cause to be made from time to time inspection of their district, with a view to ascertain whether any dwelling-house therein is in a state so dangerous or injurious to health as to be unfit for human habitation, and, if on the representation of the medical officer, or of any officer of such authority, or information given, any dwelling-house appears to them to be in such state, to forthwith take proceedings against the owner or occupier for closing the dwelling-house under the enactments set out in the Third Schedule to this Act."

The foregoing section was repealed by the Housing, Town Planning, &c., Act, 1909 (9 Edw. 7, c. 44). Part I. of the later Act is headed "Housing of the Working Classes." It contains ss. 1 to 53 inclusive. Under the sub-heading "Amendment of Procedure for Closing Orders and Demolition Orders" is the following section:—

17.—(1.) "It shall be the duty of every local authority within the meaning of Part II. of the principal Act to cause to be made from time to time inspection of their district, with a view to ascertain whether any dwelling-house therein is in a state

1915

ARLIDGE v. SCRASE.

so dangerous or injurious to health as to be unfit for human habitation, and for that purpose it shall be the duty of the local authority, and of every officer of the local authority, to comply with such regulations and to keep such records as may be prescribed by the Board.

"(2.) If, on the representation of the medical officer of health, or of any other officer of the authority, or other information given, any dwelling-house appears to them to be in such a state, it shall be their duty to make an order prohibiting the use of the dwelling-house for human habitation (in this Act referred to as a closing order) until in the judgment of the local authority the dwelling-house is rendered fit for that purpose . . . ."

By s. 47, sub-s. 1, of the Act of 1909 it is enacted that "Any provisions of this Act which supersede or amend any provisions of the principal Act shall be deemed to be part of that part of the principal Act in which the provisions superseded or amended are contained."

The Housing of the Working Classes Act, 1890 (53 & 54 Vict. c. 70), s. 51, enacts: "(1.) If any person . . . . being the owner . . . . of any dwelling-house prevents the medical officer of health . . . . from carrying into effect with respect to the dwelling-house any of the provisions of this part"—i.e., Part II.—"of this Act, after notice of the intention so to do has been given to such person, any Court of summary jurisdiction on proof thereof may order such person to permit to be done on such premises all things requisite for carrying into effect, with respect to such dwelling-house, the provisions of this part of this Act.

"(2.) If at the expiration of ten days after the service of such order such person fails to comply therewith, he shall for every day during which the failure continues be liable on summary conviction to a fine not exceeding twenty pounds . . . ."

Part IV. of the Act of 1890 is headed "Supplemental." It contained sections numbered 72 to 93. Sect. 77 was as follows:—

"Any person authorized by the local authority may at all reasonable times of the day, on giving twenty-four hours' notice in writing to the occupier of his intention so to do, enter any dwelling-house, premises, or building which the local authority

are authorized to purchase compulsorily under Part I. or Part II. of this Act for the purpose of surveying and valuing such dwelling-house, premises, or building."

This section was repealed by the Housing, Town Planning, &c., Act, 1909 (9 Edw. 7, c. 44), and replaced by s. 36 of that Act, which is placed under the heading "General Amendments" and is as follows: "Any person authorized in writing stating the particular purpose or purposes for which the entry is authorized, by the local authority or the Local Government Board, may at all reasonable times, on giving twenty-four hours' notice to the occupier and to the owner, if the owner is known, of his intention, enter any house, premises, or buildings—

"(*a*) for the purpose of survey or valuation, in the case of houses, premises, or buildings which the local authority are authorized to purchase compulsorily under the Housing Acts; and

"(*b*) for the purpose of survey and examination, in the case of any dwelling-house in respect of which a closing order or an order for demolition has been made; or

"(*c*) for the purpose of survey and examination, where it appears to the authority or Board that survey or examination is necessary in order to determine whether any powers under the Housing Acts should be exercised in respect of any house, premises, or building . . . ."

By s. 76 of the Act of 1909 it is enacted that "Part I. of this Act shall be construed as one with the Housing of the Working Classes Acts, 1890 to 1903, and that Part of this Act and those Acts may be cited together as the Housing of the Working Classes Acts, 1890 to 1909."

Clavell Salter, *K.C.*, and *Brooke Little*, for the appellant. The foundation of these convictions is s. 51 of the Housing of the Working Classes Act, 1890, which is called the principal Act. That foundation is not sufficient to support them. The section only applies to the offence of preventing the carrying into effect of "the provisions of this part," i.e., Part II., of the Act. The provision enabling a medical officer to enter for the purpose of survey and examination is not a provision of Part II. of the Act.

1915

ARLIDGE v. SCRASE.

The provision which most resembles it is s. 77, which occurs in Part IV. and not in Part II. of the Act. That section has been superseded or amended by s. 36 of the Act of 1909. By s. 47, sub-s. 1, of that Act any provisions of the Act of 1909 which supersede or amend any provisions of the principal Act shall be deemed to be part of that part of the principal Act in which the provisions superseded or amended are contained. It follows that s. 36 is to be deemed part of Part IV. of the principal Act. To prevent the carrying out of its provisions is not an offence within s. 51 of that Act. The convictions therefore ought to be quashed.

Macmorran, K.C., and *Constantine Gallop* (*S. G. Turner* with them), for the respondent. The principal Act consists of four parts. Part I. deals with unhealthy areas; Part II. with unhealthy dwelling-houses which may be the subject of closing orders and ultimately of demolition orders. Part III. is not material for the present purpose. Part IV. is material. It is headed "Supplemental" and is intended to be supplemental to the whole Act; and s. 77, which is included in Part IV., is intended to be a part of Part I. and also of Part II. It is submitted that a person who prevented the exercise of the power contained in s. 77 could have been convicted under s. 51. Sect. 77 of the principal Act has been superseded or amended by s. 36 of the Act of 1909. By virtue of s. 47, sub-s. 1, of that Act s. 36 of the later Act becomes part of that part of the principal Act in which s. 77 was contained. That section is supplemental to and therefore contained in Part II. It follows that s. 36 of the later Act is to be deemed part of Part II. of the principal Act. The same conclusion is reached in another way: Sect. 36 of the Act of 1909 is a general amendment. It amends sections dealing with closing and demolition orders and included in Part II. as well as s. 77 in Part IV. Therefore it is to be deemed to be part of Part II. Further, by s. 76, sub-s. 1, of the Act of 1909 Part I. of that Act, including s. 36, is to be construed as one with the principal Act and other Acts. For this purpose the sections in Part I. of the later Act must be distributed among the appropriate parts of the principal Act, and in this distribution s. 36 of the later Act would find its proper place in Part II. of the

principal Act. Therefore to prevent the carrying into effect of the provisions in s. 36 is to prevent the carrying into effect of a provision in Part II. of the principal Act, and the convictions should stand.

Clavell Salter, K.C., in reply.

LORD READING C.J., after dismissing the appeal so far as it related to the convictions for obstructing, proceeded as follows: The summonses for preventing present more difficulty. The Legislature, when referring to various groups of sections in the Act of 1890, the principal Act, has used the compendious expressions "Part I." or "Part II.," as the case may be, of that Act; but the draftsman of the Act of 1909 has not by that Act fitted the various amending sections specifically into the appropriate parts of the principal Act. Hence the difficulty. The process for penalizing a person who prevents the medical officer from carrying out the provisions of the Housing of the Working Classes Acts is prescribed by s. 51 of the principal Act. It is only enacted for preventing the carrying into effect with respect to a dwelling-house of "any of the provisions of this part of this Act." Sect. 51, sub-s. 1, forms the basis of the penalty clause. It enables a Court of summary jurisdiction to order the defendant to permit to be done on the premises "all things requisite for carrying into effect . . . . the provisions of this part of this Act." If he fails for ten days to comply with this order, then by sub-s. 2 he becomes liable to a penalty; but that which he is enjoined from doing is preventing the medical officer of health from carrying into effect "any of the provisions of this part of this Act"—i.e., of Part II. The appellant contends that this conviction is not for preventing the carrying into effect of any of the provisions of Part II. of the principal Act, but is for preventing the carrying into effect of the provisions of another part, it may be Part IV. of the principal Act or some enactment of the Act of 1909 which has not been included in Part II. of the principal Act. The question is whether we ought to say that a person, who refuses to allow the properly authorized officer of the local authority at a reasonable time and after proper notice to enter his house for the purpose of survey and examination

1915

ARLIDGE v. SCRASE.

Lord Reading C.J.

under s. 36 (*c*) of the Act of 1909, thereby prevents the officer from carrying into effect "any of the provisions of this part of this Act" within the meaning of s. 51 of the principal Act.

The power to enter for the purpose of survey and examination in order to determine whether any of the powers of the Housing of the Working Classes Acts should be exercised is not conferred by the principal Act. It is conferred by s. 36 (*c*) of the Act of 1909. That section is under the heading "General Amendments." Except for this provision there is no right of entry for purposes of survey and examination where survey and examination appear to be necessary in order to determine whether the powers of these Acts should be exercised, and consequently, but for this provision, there could be no conviction for preventing the entry for the purpose named. The appellant contends that this section, s. 36 of the Act of 1909, overrides s. 77 of the principal Act because s. 77 of the earlier Act is repealed by the later Act, just as, according to his argument, ss. 32 and 33 of the earlier Act are superseded by s. 17 of the later Act, which, he contends, has enacted a code relating to closing and demolition orders in substitution for ss. 32 and 33 of the principal Act of 1890. It is true that those sections formed part of Part II. of the principal Act, and that s. 36 (*b*) of the Act of 1909 clearly refers to closing orders and demolition orders which are the subject of s. 32 and the following sections included in Part II. That would indicate that at all events clause (*b*) of s. 36 should be read into Part II. of the principal Act. Still that does not suffice to introduce clause (*c*) of s. 36 into Part II. of the principal Act, and the appellant contends that it is not so introduced because there was not in Part II. of the principal Act any right of entry conferred by any section of which s. 36 (*c*) might be called an amendment. Sect. 47, sub-s. 1, of the Act of 1909 enacts that the provisions of that Act which supersede or amend any provisions of the principal Act are to be taken as part of that part of the principal Act which contained the superseded or amended provisions. That is relied on by both parties. The appellant says that the superseded or amended provision was s. 77 which was contained in Part IV. and not in Part II. of the principal Act; that Part IV. is the only part affected by s. 77

1915

ARLIDGE v. SCRASE.

Lord Reading C.J.

and consequently by s. 36 (*c*) of the Act of 1909. On the other hand Mr. Macmorran for the respondent contends that s. 47 of the later Act means this, that any provision of the principal Act which is repugnant to the new Act is intended to be repealed, and that the superseding provision of the new Act is to be read into that part of the principal Act which contained the repealed or superseded provision. I agree that s. 47 is intended to cover any sections or parts of sections in the principal Act which may be affected by the new Act and to make it quite clear that when a provision in the new Act is in conflict with the principal Act the new Act is to be looked at and the principal Act to be treated as superseded. But that does not seem to me to decide the point in issue. In my view the question is best solved by reference to s. 76 of the new Act which enacts that "Part I. of this Act shall be construed as one with the Housing of the Working Classes Acts," that is to say, Part I. of the new Act is to be read as part of the code relating to the housing of the working classes. Then one finds s. 36 (*c*) part of that code under the heading "General Amendments." That section amends generally the principal Act without purporting to specify into which part or section the amending words are to be inserted. It leaves it at large for the Court to construe the code and to determine such questions as that which we have now to decide, whether, for example, a particular section of the principal Act is to apply to any of the sections in the new Act grouped under the heading "General Amendments." Part II. of the principal Act is to be read as if there were incorporated in it other sections such as s. 17 of the new Act, the incorporation of which is obviously intended, and s. 36 (*c*), which deals with the same subject-matter as is dealt with in Part II. of the principal Act. In this way effect is given to the general scheme, and I am the more inclined so to read Part II. because in the principal Act s. 77 is to be found in Part IV., which is itself headed "Supplemental," and I cannot think that any Court which had to construe the principal Act alone would find any difficulty in reading s. 77 into Part II. of that Act so as to make s. 51 apply to a breach of s. 77. When one part of an Act is expressly made supplemental, the intention is that the supplemental part

1915

ARLIDGE v. SCRASE.

Lord Reading C.J.

contains further provisions applicable not to one part only of the Act but to the Act generally, and therefore to one or another of its parts as the scope of the Act may require. This was certainly the case with s. 77, which expressly dealt with both Part I. and Part II. In deciding as I do I have not overlooked the argument of the appellant that a quasi-penal enactment should not be construed so as to enlarge its scope. Notwithstanding that contention, I have come to the conclusion that s. 36 (*c*) of the Act of 1909 is to be deemed to be incorporated in Part II. of the principal Act so as to make a breach of that section punishable under s. 51 of the principal Act. This appeal must therefore be dismissed.

RIDLEY J. I agree with my Lord as to the main grounds for deciding that s. 36 (*c*) of the Act of 1909 is to be construed as part of Part II. of the principal Act. I also think it may be fairly argued that s. 36 of the new Act has the effect of superseding or at any rate amending provisions which were contained in Part II. of the principal Act, and must therefore be read as part of Part II. in accordance with the direction contained in s. 47 of the new Act. For Part II. of the principal Act there have been substituted s. 17 and other sections in Part I. of the new Act. In s. 17 are provisions in substitution of ss. 32 and 33 of the principal Act dealing with closing orders and demolition orders; but nowhere in Part II. of the principal Act is any provision such as s. 36 (*c*) of the new Act. When that enactment is read together with the provisions of Part II. of the principal Act it is found that a power is conferred which is to be in addition to those conferred by Part II. of the earlier Act, namely, a power without reference to any closing order or demolition order conferred upon authorized officers of the local authority to enter premises for the purpose of survey and examination in order to ascertain whether the powers of the authority should be exercised or not. A consideration of the code as a whole shows that Part II. of the principal Act has been superseded or amended to that extent; in other words s. 36 of the new Act is to be taken as part of Part II. of the principal Act. In my view the decision of the justices may be supported upon this ground as well as upon the ground indicated by my Lord.

1915

ARLIDGE v. SCRASE.

SHEARMAN J. In order to answer the argument that s. 51 of the principal Act only authorizes a conviction for interference with the provisions of Part II. of that Act it is necessary to show that s. 36 (*c*) of the new Act is now a part of Part II. of the principal Act. In my judgment that is made out. By s. 47 of the new Act any provisions of that Act which supersede or amend any provisions of the principal Act are to be deemed to be part of that part of the principal Act in which the provisions superseded or amended are contained. The superseded s. 77 was in Part IV., and no doubt other sections of the principal Act have been superseded by other sections of the new Act; for example ss. 32 and 33 of the principal Act have been superseded by s. 17 of the new Act. But I cannot doubt that s. 36 of the new Act is what it purports to be, a general amendment. It may supersede one provision and generally amend, without purporting to supersede, another. Then by virtue of s. 47 it is to be deemed to be part of that part of the principal Act in which the amended provision was contained. In my view it amends certain sections in Part II. of the principal Act. If that is so it follows that s. 36 of the new Act becomes part of Part II. of the principal Act. The appeal must therefore be dismissed.

Appeal dismissed.

Solicitors for appellant: *Rubinstein, Nash & Co.*
Solicitor for respondent: *Arthur P. Johnson.*

W. H. G.

C. A.
1915
June 19.

[IN THE COURT OF APPEAL.]

MAISEL *v.* FINANCIAL TIMES, LIMITED.

Practice—Discovery — Libel — Justification — Character and Reputation—Particulars of Justification—Acts occurring after Date of Libel.

The plaintiff brought an action against the defendants for libel which he alleged meant that he had absconded with the property of a company, that his solvency was doubtful, and that his character and reputation were such that he was likely to misappropriate funds of companies with which he was connected. The defendants pleaded that the words taken in that sense were true in substance and in fact, and in their particulars of defence they stated various acts by the plaintiff to show that he had a tendency to be dishonest. Several of these acts had occurred after the date of the publication of the libel, and the plaintiff applied for an order to strike these out as inadmissible :—

Held, affirming the decision of Ridley J., that in a case of libel on character and reputation, where justification was pleaded, evidence of facts which occurred within a reasonable time after the publication of the libel and went to show the existence of an alleged tendency was admissible.

Appeal from a decision of Ridley J.

This was an action for damages for libel alleged to have been published by the defendants in their newspaper, the *Financial Times*. Another application in this case had already been decided by the House of Lords. (1) The plaintiff was managing director of the Oil Trust of Galicia, Limited. In his statement of claim he set out the libel as follows. Paragraph 3 :

"On January 17, 1912, in the issue of the said *Financial Times* of that date the defendants falsely and maliciously printed and published and/or caused to be printed and published of the plaintiff aforesaid the words following, that is to say :—

"'Arrest of Mr. B. P. Maisel.

"'Warrant executed in Berlin—Charge of Fraud in Connection with Patents.

"'It is announced that Mr. B. P. Maisel, who is well known in London, has been arrested in Berlin on a warrant issued by the authorities of Hanover, charging him with fraud in connection with a number of transactions relating to patents. Mr. Maisel was identified by means of a drawing which the police had made

(1) (1915) 31 Times L. R. 192.

from descriptions given by a person who claims to have been victimised by the prisoner, among whose luggage were found bills and securities representing a sum of over 75,000*l.* in addition to a considerable amount of jewellery. Mr. Maisel was a director of the Oil Trust of Galicia.

. . . . . .

"'Inquiries at the London office (meaning thereby the office of the said Oil Trust of Galicia) elicited a statement to the effect that so far as was known none of the property found on Mr. Maisel related to the Oil Trust of Galicia, and on this becoming known the shares which had previously been selling at a little over 11*s.* advanced sharply and at the close were bid for at 12*s.* 3*d.* It is of course very difficult to say at present precisely how Mr. Maisel's affairs stand, but it would appear that there was practically no opportunity for him to gain possession of any cash or securities belonging to the company. A board meeting was held yesterday, but no information beyond what we have already set forth was forthcoming. It is probable that the directors will issue a statement at an early date,'" and continued, by way of innuendo, "meaning thereby that the plaintiff had absconded from this country and had taken with him 75,000*l.* in securities and a large quantity of jewellery of which he was unlawfully in possession and which were the property of the Oil Trust of Galicia Limited or of some other person or company, and that his affairs were in an involved condition and that he was of doubtful solvency and that his character and reputation were such that he was likely to have misappropriated funds of companies with which he was connected and that he would have misappropriated the funds of the Oil Trust of Galicia Limited if he had had the opportunity and that inquiries had been made at the offices of the said company, and that the officials thereof had refused to state whether the said property was or was not the property of the said company but that the board of the said company were investigating its affairs with a view to ascertaining whether the plaintiff had misappropriated its funds and that the plaintiff was an unfit person to be a director of the said or any company or to hold any position of trust and that he had ceased to

C. A. 1915

MAISEL v. FINANCIAL TIMES, LIMITED.

be a director of the said company by reason of his character, reputation, or acts."

The defendants alleged that so far as the words complained of consisted of statements of fact they were in their natural and ordinary meaning true in substance and in fact, and that in so far as they consisted of expressions of opinion they were fair and bona fide comments on matters of public interest and were published bona fide for the benefit of the public and without malice to the plaintiff.

The defendants were ordered to give particulars of the statements of fact which they alleged to be true. These particulars were amended and interrogatories administered to the plaintiff. Other orders followed (the proceedings being taken to the House of Lords), and by their re-amended defence the defendants in paragraph 3 (*a*) alleged that the words did not bear the meaning attributed to them by the innuendo, and by paragraph 3 (*b*):

"In the alternative to what is in this paragraph hereinbefore stated the defendants say that if the said words mean that the plaintiff was of a character and reputation such that he was likely to have misappropriated funds of companies with which he was connected and that he would have misappropriated the funds of the Oil Trust of Galicia Limited if he had had the opportunity and that he was an unfit person to be a director of the said or any company the said words are, in the meaning that the plaintiff was of a character and reputation such that he was likely to have misappropriated funds of companies with which he was connected and that he would have misappropriated the funds of the Oil Trust of Galicia Limited if he had had the opportunity and that he was an unfit person to be a director of the said or any company, true in substance and in fact."

The defendants delivered amended particulars in which they stated as facts which supported and justified the words of the alleged libel certain events which had taken place after the date of the publication of the libel.

On an application in chambers the Master made an order that so much of the particulars as related to events subsequent to the libel complained of should be struck out.

Ridley J. reversed this order, and the plaintiff appealed.

W. Blake Odgers, for the appellant. The defendants are not entitled to support their plea of justification by setting up events which happened after the publication of the libel: Taylor on Evidence, 10th ed., pp. 272, 274; *Rex* v. *Rodley* (1); *The Queen* v. *Rogan and Elliott* (2); *Thompson* v. *Nye* (3); Odgers on Libel and Slander, 5th ed., p. 401. It is not possible to justify a libel which was published merely on suspicion: *Arnold & Butler* v. *Bottomley*. (4)

Gordon Hewart, K.C., and *Hugh Fraser*, for the respondents, were not called upon to argue.

LORD COZENS-HARDY M.R. This is an appeal which raises a point which has been very fully and very ably argued by Mr. Odgers, and which is, whether, having regard to the terms of the innuendo in an action for libel, and having regard to the amendment made by the Court of Appeal, which I assume was made by the consent of both parties, it is open to the defendants in the particulars of justification to refer to matters which took place after the publication of the alleged libel.

Speaking generally, in an ordinary case of libel, as was put by Phillimore L.J. in this very case (5), if you say of a man, "He stole a hatchet on such and such a day," you must justify that particular allegation, and that is all: it is not relevant to say that he stole a hatchet the day before, or stole a hatchet the day after. But when you get an allegation such as I find here, it seems to me that different considerations apply.

Now how does the plaintiff put it in his statement of claim? In paragraph 3, after setting out the libel itself,—a libel which no doubt made serious charges against the plaintiff—it goes on to say: [His Lordship read the innuendo.] When this matter came before the Court of Appeal, the Court allowed, or, I think I may go further and say, the Court settled, this amendment in paragraph 3 (*b*). [His Lordship read the re-amended paragraph.]

In a general allegation by way of justification of general character and general tendency, which are the only words I can

(1) [1913] 3 K. B. 468.
(2) (1846) 1 Cox, C. C. 291.
(3) (1850) 16 Q. B. 175.
(4) [1908] 2 K. B. 151.
(5) 31 Times L. R. 192.

C. A. 1915

MAISEL v. FINANCIAL TIMES, LIMITED.

Lord Cozens-Hardy M.R.

think of at the moment as the meaning of the word "likely," I do not see how you can exclude events which happen, I will not say years after, but within a reasonable time from the date of the publication. I instance a case which seems to me to be rather analogous: an allegation that the plaintiff was addicted to drink and would get drunk if he could. Could you exclude evidence that the day after publication of that libel he had been found suffering from delirium tremens? It seems to me you could not in answer to a general allegation of what the man was likely to have done if he could. Of course the acts in question raised by the amendment may be altogether too distant in point of time from the publication of the alleged libel. I do not in the least suggest that they are or are not, but the allegations in the particulars relate to acts of a similar kind within some two or three months from the publication of the alleged libel. Having regard to the financial nature of these transactions I do not think it possible to say that they were too remote to be allowed to be evidence of what a man was likely to have done at the date of the publication.

That being so, I think that the view taken by Ridley J. in this case was right. This was not merely a justification of the particular acts the man had done at the time, but was an allegation of his being likely to have done these acts if he had the opportunity. In my opinion the view taken by the learned judge was right, and I think this appeal should be dismissed.

PICKFORD L.J. I am of the same opinion. The question is nominally whether answers should be given to interrogatories, but in substance it is whether it is admissible in an action of libel, where there is a plea of justification, to give, in support of the plea, particulars of justification alleging facts which occurred after the libel. It seems to me that to that proposition there can be given no direct answer, Yes or No: I think it must depend upon the nature of the libel, and it must also depend upon the nature of the acts.

Now the nature of the libel here has been defined by the innuendo. When I say "the nature of the libel," I do not say that a jury would necessarily say that it means that; but that is

what the plaintiff alleges that it means according to the final amendment of the defence. The defendants say that if the said words mean that the plaintiff was of a character and reputation such that he was likely to have misappropriated the funds of the company with which he was connected and that he would have misappropriated the funds of the Oil Trust of Galicia, Limited, if he had had the opportunity, "the said words are, in the meaning that the plaintiff was of a character and reputation such that he was likely to have misappropriated funds of companies with which he was connected and that he would have misappropriated the funds of the Oil Trust of Galicia, Limited, if he had had the opportunity and that he was an unfit person to be a director of the said or any company, true in substance and in fact." That is the defence as finally settled, and it follows the plaintiff's own innuendo. The innuendo was that it meant that his character and reputation were such that he was likely to have misappropriated the funds of the company with which he was connected, and that he would have misappropriated the funds of the Oil Trust of Galicia, Limited, if he had had the opportunity. Therefore the defence, as finally settled, follows exactly the innuendo of the plaintiff. That alleges that this libel has three meanings, as I read it: that he was of a character and reputation such that he was likely to have misappropriated; that he would have misappropriated if he had had the opportunity and that he was an unfit person to be a director—the third one I have left out. That being the meaning as alleged and the defence of justification which is set up, it seems to me that it is impossible to exclude, by one general proposition, any particulars of acts that took place after the libel. The allegation is that he was of a character to misappropriate funds and that he would misappropriate funds if he got the chance. It seems to me that it cannot be irrelevant to show that very shortly after the libel, as soon as he did get the chance, he did misappropriate.

I wish to adopt entirely what was said by Lord Reading C.J. in his judgment in this case (1) so as to guard myself against being supposed to say that, wherever an allegation is made against a man of having done something, you may give evidence

(1) Not reported. See 31 Times L. R. 192.

C. A. 1915

MAISEL v. FINANCIAL TIMES, LIMITED.

Pickford L.J.

of what has happened during all his life as being evidence to show it was likely to happen. It is expressed perfectly clearly by the Lord Chief Justice. "Suppose, for example, to use Phillimore L.J.'s illustration, if you say A. B. stole a hatchet, and then you give particulars, justifying that by a series of acts extending over his life, showing either that he had stolen other articles, or that he was the kind of dishonest person who would steal articles if he had the chance, nothing in our judgment is intended to give effect to any such contention as that. We understood that was the contention put forward by Mr. Shearman. It is quite clear that could not be; it has been decided many times and it is unnecessary to deal further with that." I wish to guard myself against being supposed to say that, if you want to prove a libel on a man alleging something at a particular date, you may always prove anything that happened afterwards in order to show that he was likely to have done it. I do not think such a proposition can be maintained for a moment. But where, as here, the allegation complained of is that he is a person of a character likely to do a certain act and that he would do the certain act if he got the opportunity, then it seems to me that it cannot be said to be irrelevant to prove that as soon as ever he got the opportunity, a short time after the libel, he did it. It may be that the act which he did was so long after the libel that it would have no relevance at all having regard to the time of the libel. If that were so, it would not be admissible. The only doubt I have had in this case is whether some, at any rate, of these acts are not too remote and therefore ought not to be given in evidence in that way. But I think, considering that the libel was published somewhere about the middle of January and that these transactions alleged in the particulars began somewhere about the middle of February and continued systematically according to the allegation (I do not say whether it is true or not) from that time up to May, there is not really any reason for excluding them on the ground that they are too remote. Therefore I agree that this appeal should be dismissed.

WARRINGTON L.J. I agree. The plaintiff complains, amongst other things, that the defendants had said that he would have

misappropriated the funds of the particular company if he had the opportunity. The defendants have justified that statement. The libel having been in January, they propose to allege that on several occasions, commencing early in February, and extending to some day in May, of 1912, he had the opportunity and availed himself of it. It seems to me that the series of acts which they propose to allege come so near to the date of the libel that evidence of it would be admissible in support of justification of the statement that he would have done the acts if he had the chance.

In the Court of Appeal on the previous occasion, and in the House of Lords, the Court of Appeal and the House of Lords were not dealing with the particular complaint we are dealing with now; they were dealing then with another complaint, namely, that the defendant had said of the plaintiff that he was a man of a certain character and reputation. I read the plaintiff's complaint contained in the innuendo, and, therefore, the plea of justification, as leading to three separate things: the character, the reputation, and the fact that the man would have done a certain thing if he had the chance and that therefore he was not a fit person to be a director.

I agree that the appeal ought to be dismissed.

Appeal dismissed.

Solicitors: *W. G. A. Edwards; Nicholson, Graham & Jones.*

H. C. R.

C. A.
1915
June 14, 15, 24.

[IN THE COURT OF APPEAL.]

PROCTOR *v.* OWNERS OF S.S. SERBINO.

Employer and Workman—Compensation—Accident arising out of Employment—Seaman—Unexplained Drowning—Evidence—Inference—Conjecture—Workmen's Compensation Act, 1906 (6 *Edw.* 7, *c.* 58), *s.* 1.

A seaman was chief engineer on a steam vessel and was responsible for the working of all the machinery in the ship. He was troubled because there was something wrong with the propeller. On the evening before the ship arrived in port he told the steward to call him before his usual hour and let him have some tea. This was done; he got up about 5.30 A.M., dressed in his working clothes, and was last seen going to the stern of the ship. His watch would not have begun till 8 o'clock:—

Held, that there was evidence to support the finding of the learned county court judge that his death was caused by an accident arising out of and in the course of his employment within the meaning of the Workmen's Compensation Act, 1906.

APPEAL from an award of the judge of the Kingston-upon-Hull County Court sitting as arbitrator under the Workmen's Compensation Act, 1906.

D. J. Proctor, chief engineer on board the steamship *Serbino*, was lost overboard on June 16, 1913, and his dependants applied for compensation.

The learned county court judge awarded 300*l.* compensation, and the respondents appealed.

The following statement of the facts is taken from the judgment of Lord Cozens-Hardy M.R.:—

The facts as found by the county court judge are as follows: The deceased man was chief engineer in a steam vessel trading between Petrograd and Hull. She was a new vessel, and this was her second voyage. As chief engineer, he was responsible for the working of all the machinery in the ship. He was a good deal troubled because there was something wrong with the propeller, and he seems to have thought that one of the blades must have been damaged. He mentioned this several times. On the evening before his death, he told the steward to call him earlier than his usual hour and let him have some tea. This was done: he had some tea, put on his working

clothes, and was seen to go towards the stern of the vessel. He was never seen again. His watch would not have begun till 8 o'clock, and the inference seems to me to be that he got up earlier for some special reason. His position as chief engineer entitled him, and I think it was his duty, to go and examine any particular part of the machinery about the condition of which he felt a doubt, without any express order from the master of the ship. His duties were certainly not confined to the engine-room. He was last seen, as I have said, going in the direction where the steering gear apparatus and the propeller were to be found, and it was possible, though not very easy, for a man to look down upon the propeller even when the ship was proceeding at her usual rate.

A. Neilson and *W. H. Owen*, for the appellants. There is no evidence from which it can be inferred that the deceased met with an accident arising out of his employment. It was considered to be settled that surmise, conjecture, or guess was not permissible on such questions: per Lord Halsbury in *Barnabas* v. *Bersham Colliery Co.* (1); and the burden of proof is on the person who seeks to establish the liability of the shipowner: *Bender* v. *Owners of S.S. Zent* (2); *Marshall* v. *Owners of S.S. Wild Rose.* (3) The difficulty is caused by the recent decision of *Kerr or Lendrum* v. *Ayr Steam Shipping Co.* (4), in which very wide inferences were drawn from very slight evidence of facts. Their Lordships did not intend to disturb the settled rule; and in the present case there is nothing to show that the deceased met with his death by accident arising out of his employment, or that he was on duty at the time.

Gordon Hewart, K.C., and *Gilbert Stone*, for the applicants. The question is whether on the evidence a reasonable man could have arrived at the same conclusion as the county court judge. The point is covered by *Kerr or Lendrum* v. *Ayr Steam Shipping Co.* (4) There was enough evidence here to enable the learned judge to draw the inferences which he states in his

(1) (1910) 103 L. T. 513.
(2) [1909] 2 K. B. 41.
(3) [1909] 2 K. B. 46; [1910] A. C. 486.
(4) [1915] A. C. 217.

C. A. 1915

PROCTOR v. S.S. SERBINO (OWNERS).

judgment: *Furnival* v. *Johnson's Iron and Steel Co.* (1) It is reasonable to infer that the deceased got up early in order to put himself on duty and get on with his work. The propeller was under his care. If he met with the accident whilst on duty it arose out of his employment: *Mackinnon* v. *Miller* (2); *Owners of S.S. Swansea Vale* v. *Rice* (3); *Lee* v. *Stag Line Co.* (4); *Grant* v. *Glasgow and South Western Ry. Co.* (5); *Sheehy* v. *Great Southern and Western Ry. Co.* (6)

W. H. Owen in reply referred to *Burwash* v. *F. Leyland & Co.* (7)

Cur. adv. vult.

June 24. LORD COZENS-HARDY M.R. This appeal raises a question upon which there has been great difference of judicial opinion, extending even to the final Court of Appeal.

A sailor in mid-ocean disappears: there is no direct evidence as to the circumstances attending his death. One thing is clear, that his body is at the bottom of the sea; he was drowned. There may be at least three theories, any one of which would account for the drowning. It may be suicide, it may be murder, it may be accident, and such accident may be or may not be arising out of his employment. I think it is settled law that if nothing more is known, and you are driven to mere surmise or conjecture, the dependants of the deceased cannot succeed in their claim for compensation. The burden is on them to prove that death occurred by reason of accident arising out of and in the course of his employment. But this does not impose upon the dependants the burden of furnishing direct evidence of the death. If there are facts from which a presumption may properly be drawn, the application may succeed. The real difficulty arises because in each case the facts have to be scrutinized with great care in order to be satisfied that a presumption can be legally made. It has been often said that the facts in one case are not really a ground of decision in another case, but I think the recent decision of the House of Lords in *Kerr or Lendrum* v.

(1) (1911) 5 B. W. C. C. 43.
(2) (1909) 2 B. W. C. C. 64.
(3) [1912] A. C. 238.
(4) (1912) W. C. & Ins. Rep. 398.
(5) 1908 S. C. 187.
(6) (1913) W. C. & Ins. Rep. 404.
(7) (1912) 5 B. W. C. C. 663.

Ayr Steam Shipping Co. (1) shows that very slight facts suffice as basis for very wide presumptions. I think too that a sailor on board ship at sea, whose employment is continuous, stands in a somewhat special position; and that if it can be shown, or properly inferred, that when last seen he was engaged in doing his duty as a seaman, the Court may presume that the accident with which he met arose out of his employment.

I do not propose to attempt the somewhat hopeless, it may be impossible, task of reconciling all the authorities on this point, but it may be convenient to give one or two instances in which presumptions have been made. In *Mackinnon* v. *Miller* (2) Lord Dunedin, whose judgment has been approved in the House of Lords, used language which I respectfully desire to adopt. *Mackinnon* v. *Miller* (2) was a case of this kind: "An engineer who was employed on board a small steam tug was last seen asleep in his bunk at 5 A.M. An hour afterwards he had disappeared, leaving his working clothes lying at the side of his bunk. The tug was to commence towing at 7 A.M. that morning, and steam had been ordered to be got up for that hour. The deck was a place where between 5 and 7 he was entitled to be. Two days afterwards his body, clad in his ordinary sleeping clothes, was found in the water near the place where the tug had been moored on the morning in question. In the opinion of the doctor who examined the body, death was due to drowning. There was no direct evidence as to how the deceased (who was unable to swim) had met with his death. Held, that the arbiter was entitled to draw the inference of fact that the workman had accidentally fallen overboard and been drowned, and that the accident arose out of and in the course of his employment."

This accident did not happen in the open sea. I must read a few passages from the judgment of Lord Dunedin: "Now it is quite evident that so stated the question is one of fact, and of fact only. It is said by the appellant's counsel here, and said quite truly, that there is an affirmative proposition to be proved by the pursuer, and that that affirmative proposition is not satisfied by simply proving that the man

(1) [1915] A. C. 217. (2) 2 B. W. C. C. 64, 68, 69.

C. A. 1915

PROCTOR v. S.S. SERBINO (OWNERS).

Lord Cozens-Hardy M.R.

was found dead, but that you must establish the proposition that his death was by accident, and that the accident arose out of and in the course of his employment. The determination of that proposition must still depend upon evidence, and must depend upon whatever class of evidence is available. The truth is, that when the matter is closely considered, there is after all no real difference between the result that the tribunal arrives at whether it is based upon direct testimony or upon what is called circumstantial evidence. Certainty is incompatible with human fallibility." Then a little later he says: "Accordingly, it is almost, you may say, an accident whether direct testimony or the inference drawn from circumstantial evidence is the more cogent. Where you have direct testimony in such circumstances that you feel absolutely sure that the witnesses are speaking the truth, and where also it seems so improbable as to be almost impossible that they have been deceived in their senses in comprehending the matters from which they have drawn their conclusion, that is as satisfactory testimony as can be got. But there may be many cases where what is called circumstantial evidence may lead to results so certain that it is quite as good as, if not better than, direct testimony." Then he cites a passage from Shakespeare. Proceeding, he says: "Accordingly, it seems to me that here, where there is undoubtedly no direct testimony, there is nothing antecedently wrong in saying you may come to a certain inference although that inference is only based upon circumstantial evidence. I agree that if the learned sheriff-substitute's view was based upon such want of evidence, or such disregard of evidence, that we could say that it was a view to which no reasonable man had fairly a right to come, we could, although the question was one of fact, I think, correct his judgment. But I cannot say that I think the inference that he drew from those facts was so violent as to entitle us to interfere with it. It really, I think, depends upon two propositions. The first is that the death of Miller was due to his accidentally falling overboard and being drowned. Well, of course, that you may say is a conclusion which cannot be reached with absolute certainty. I agree, because nothing is absolutely certainly known except that his body was found with the symptoms of drowning in the

loch. But it was found at the place where the vessel had been lying, and I honestly think that not only is it an inference which may be drawn, but it is an inference which an ordinary man would draw, taking into consideration the whole circumstances, nor is there anything to suggest that his death happened in any other way, or that there was any motive for his going over the side. I think the ordinary man might perfectly well draw the inference that he had met his death by tumbling off the deck. That, of course, is not enough. What, then, shall we say as to the fact of whether the accident arose out of and in the course of the employment? That, again, is a matter of inference, but is it not an inference which may fairly be drawn? The deck was a place where Miller had every right to be; the deck was a place where even at that hour of the morning he might fairly be, not perhaps in the direct carrying out of his duties, but for indirect purposes with which these duties were not unconnected, because I suppose no one doubts—in fact the decisions have long ago settled—that you do not need to construe the words so strictly as to hold that a workman can never be in the course of his employment unless he is actually working."

In the case of *Owners of Ship Swansea Vale* v. *Rice* (1) the House of Lords, affirming the decision of this Court, held that the unexplained disappearance of a first mate while on duty, keeping his watch, was sufficient ground for inferring that he met his death by accident arising out of his employment. Lord Loreburn L.C. says (2): "What you want is to weigh probabilities, if there be proof of facts sufficient to enable you to have some foothold or ground for comparing and balancing probabilities at their respective value, the one against the other." Then towards the end of his speech the Lord Chancellor said: "The probabilities are far greater that this man perished through an accident arising out of and in the course of his employment."

This Court in *Furnival* v. *Johnson's Iron and Steel Co.* (3) and *Lee* v. *Stag Line Co.* (4) endeavoured to follow the principle thus laid down.

(1) [1912] A. C. 238.
(2) Ibid. at pp. 239, 240.
(3) 5 B. W. C. C. 43.
(4) (1912) W. C. & Ins. Rep. 398.

C. A. 1915

PROCTOR v. S.S. SERBINO (OWNERS).

Lord Cozens-Hardy M.R.

The most recent authority in the House of Lords is *Kerr or Lendrum* v. *Ayr Steam Shipping Co.* (1) It is impossible to read the speeches of the noble Lords who formed the majority without seeing that from very slight facts very wide inferences were drawn. This statement is not strictly accurate. It was not for the House of Lords, and it is not for us, to draw the inference. Our duty is limited to the consideration whether there was sufficient justification for the inference which the county court judge has drawn. In my opinion we ought to be slow in interfering with his decision in a case of this nature. [His Lordship stated the facts and continued.] The learned county court judge has held that in these circumstances he was justified in presuming, and he has presumed, that it was an accident, for he has negatived suicide or murder, and, further, that the accident arose out of his employment. I am unable to say that he was not justified in drawing this inference. It is more than a guess or surmise, and this suffices to support the award. The appeal must be dismissed.

PICKFORD L.J. In this case the question is whether there was any evidence upon which the county court judge could find that the death of a first engineer on board a ship arose out of his employment. If there were any evidence it is not contended that we can interfere with his finding.

I do not think it necessary to consider what view I might have taken of the case in the absence of guidance from other cases. I think we cannot interfere with the county court judge's decision consistently with the reasoning of the majority of the House of Lords in *Kerr or Lendrum* v. *Ayr Steam Shipping Co.* (1)

It is said in that case, and many others, that one decision on a question of fact is no precedent for a decision on other facts, but when the question of fact is a somewhat special one, i.e., whether an accident arose out of the person's employment and is the same in the two cases, I think we cannot disregard the opinion of the House of Lords as to the class of circumstances from which inferences may be drawn. There is a great similarity between the facts of the two cases.

(1) [1915] A. C. 217.

In the case of *Kerr or Lendrum* v. *Ayr Steam Shipping Co.* (1), the facts, so far as it is necessary to state them, were that the deceased man was a cook and steward, that he slept in a room on deck leading from the saloon, that he had suffered from sickness which he had attributed to the want of ventilation in his room, and had been seen on some occasions vomiting over the side of the ship, and that on the day of his disappearance he had been ordered by the captain to get tea for the crew. From this point, so far as actual evidence went, there was a blank until his body was found on the next day in the dock at a place near to where the stern of the ship and the part of the rail at which he had been seen vomiting had been. There was evidence negativing suicide. On these facts the sheriff-substitute found that the deceased left his bunk, went on deck, and accidentally fell overboard and was drowned, and that such drowning was an accident which arose out of his employment. The House of Lords, reversing the Court of Session, held that there was evidence to support that finding.

In the case before us the deceased man was the chief engineer. He had been troubled and worried about something that had happened to the propeller and also about the refrigerating machinery. On June 15 in the evening he told the steward to let him have a cup of tea when the second engineer had his, which was at 5.30 A.M. on the 16th. The chief engineer's watch did not begin until 8 o'clock. The steward brought him his tea and saw him come out of his room and go towards the after-part of the ship. He watched him go round the house, and he was never seen again. There was evidence that sometimes engineers were called before the time of their watch when there was work they wanted to do, though this particular engineer had not been so called while on this ship. There was also evidence that by getting over the rail of the ship and holding on it was possible to see the propeller. As in *Kerr or Lendrum* v. *Ayr Steam Shipping Co.* (1) there was a blank in the direct evidence from the time of the order to get the tea for the crew, so here there was a blank from the time the chief engineer left

(1) [1915] A. C. 217.

C. A. 1915

PROCTOR v. S.S. SERBINO (OWNERS).

Pickford L.J.

his room. Suicide was suggested, but the county court judge considered that the circumstances negatived it.

The duty of a chief engineer is not confined to the time when he is actually standing on his watch in the engine-room. He is charged with the general control and superintendence of the machinery, and in my opinion if he thought there was any supervision or examination required and went to do it he would be engaged in the performance of his duty just as much as if he were on watch.

On June 16, when the ship was about six hours from her home port, the chief engineer in accordance with orders given overnight was called two and a half hours before the beginning of his watch, and was seen to come out of his room in his working clothes and go towards the afterpart of the ship. That was a part of the ship in which there was machinery under his control, i.e., parts of the steam steering gear, and also the propeller about which he had expressed some anxiety and some wish to ascertain the cause of the trouble with it. I think it is a fair inference that when he came out of his room on that morning he came out with the intention of doing something connected with his duty, but the more difficult question is whether there is evidence from which an inference may be drawn that his death was due to an accident arising out of his employment. It seems to me that if in *Kerr or Lendrum* v. *Ayr Steam Shipping Co.* (1) it was open from the fact of the order being given to the steward to infer that he got up in obedience to it and therefore in performance of his duty, and that he then fell overboard in the course of the discharge of such duty, it was open to the county court judge here to come to the conclusion that the deceased man came out of his room to perform his duty and fell overboard in discharge of it, and, therefore, although that case does not bind us, as it is a decision on other facts, I think that acting on its reasoning I ought to hold that there was evidence on which the county court judge could draw the inference which he did draw. It seems to me that the class of circumstances in the two cases is so similar that I ought to follow the decision of the House of Lords, although the facts are not identical.

(1) [1915] A. C. 217.

C. A. 1915

PROCTOR v. S.S. SERBINO (OWNERS).

WARRINGTON L.J. The workman in this case was chief engineer on the steamship *Serbino*. On the morning of June 16, 1913, he met his death by drowning while the ship was on a voyage from Petrograd to Hull. The learned county court judge has held that his death arose from accident arising out of and in the course of his employment.

No one saw the man enter the water or was able to depose to the circumstances actually attending his death, but in my opinion the judge was right in rejecting the suggestion of suicide, for which there was no ground. Murder was not suggested. Accident remains as the only possible cause for the man getting into the water and so meeting his death. Such accident arose during the voyage for which the man was engaged and therefore in the course of his employment. The learned judge has found that it arose out of his employment, and the question—the only question—we have to determine is whether there was any evidence on which the judge could arrive at such a finding.

I think the cases afford us this much of guidance in the matter of principle, that if a man, while actually on duty under conditions which involve an element of danger, meets with an accident the actual circumstances of which are not capable of being ascertained, it may properly be inferred that such accident arose out of as well as in the course of his employment. I refer particularly to (1.) the dictum of Farwell L.J. in *Marshall* v. *Owners of S.S. Wild Rose* (1), where he says: "If an ordinary sailor is a member of the watch and is on duty during the night and disappears, the inference might fairly be drawn that he died from an accident arising out of his employment. But if, on the other hand, he was not a member of the watch, and was down below and came up on deck when he was not required for the purpose of any duty to be performed on deck and disappeared without our knowing anything else, it seems to me that there is absolutely nothing from which any Court could draw the inference that he died from an accident arising out of his employment"; and (2.) to the decision in *Owners of Ship Swansea Vale* v. *Rice*. (2) I think also that it is the same idea which lies at the bottom of the speeches delivered by the majority of the members

(1) [1909] 2 K. B. 46, 50. (2) [1912] A. C. 238.

C. A. 1915

PROCTOR v. S.S. SERBINO (OWNERS).

Warrington L.J.

of the House of Lords in *Kerr or Lendrum* v. *Ayr Steam Shipping Co.* (1)

Was there evidence in this case that the man was actually on duty when the accident happened? I think there was. He was the chief engineer, and he was responsible for the machinery on the ship. A defect in the propeller had been discovered and he was much exercised in mind on this subject during the voyage from Petrograd. His watch on June 16 was from 8 A.M. to 12. The ship was expected to arrive at Hull about 2. On the evening of the 15th he gave instructions to the steward to call him about two hours before he was to go on watch and to bring him some tea. He was called accordingly and got up shortly afterwards, dressed in his working clothes, and was last seen walking behind the house containing the steam steering gear towards the stern of the ship. I think it is reasonable to infer that knowing that unless he made use of the early morning before going on watch he would have little or no time to examine the machinery not in the engine-room, and particularly the condition of the propeller, he deliberately arranged to be called for the purpose, and that he went to the stern of the ship with the object of ascertaining, if he could, what was wrong with the propeller. I think there was evidence that he put himself on duty. I think further that he was on duty under conditions which involved elements of danger. It was possible for him to see the propeller revolving in the water by either getting over the rail and holding on, or getting his body through one of the openings of the rail and craning over the stern; either operation was dangerous. While thus on duty he disappeared.

I think therefore there was enough in the case to justify the inference that he died from an accident arising out of his employment.

Appeal dismissed.

Solicitors: *Botterell & Roche, for Hearfields & Lambert, Hull; C. J. Smith & Hudson, for Locking, Holdich & Locking, Hull.*

(1) [1915] A. C. 217.

H. C. R.

[IN THE COURT OF APPEAL.]

C. A.
1915
June 11, 14, 15

DUNCAN, FOX & CO. *v.* SCHREMPFT & BONKE.

Sale of Goods—C.i.f. Contract—Payment against Shipping Documents—Outbreak of War before Tender of Documents—Goods carried in Enemy Ship—Trading with Enemy—Whether Buyers bound to accept Documents.

The claimants, who were an English firm, sold on May 11, 1914, to the respondents, who also were an English firm, "about 300 barrels June and/or July shipment Chilian honey per steamer . . . . cost freight and insurance to Hamburg . . . . Payment net cash in Liverpool in exchange for shipping documents on presentation of same." The honey was shipped at Penco in June on board the German steamship *Menes* and by the bill of lading was to be carried to Hamburg, where it was to be delivered to the claimants or their assigns. A condition indorsed on the bill of lading provided that all questions arising thereunder were to be governed by the law of the German Empire and to be decided in Hamburg. On August 4, 1914, war was declared by Great Britain on Germany; on August 5 a Royal Proclamation was issued warning British subjects against trading in any goods destined for any person resident, carrying on business, or being in the German Empire; and on the same date the claimants tendered the shipping documents to the respondents, who, however, refused to accept the same. The *Menes* had not arrived at Hamburg at the date of the tender of the documents:—

Held, that the respondents were justified in refusing to accept the tender of the documents because the further performance of the contract would have involved a trading in goods destined for the German Empire in violation of the Royal Proclamation against trading with the enemy.

Decision of Atkin J. [1915] 1 K. B. 365 affirmed.

Appeal from the decision of Atkin J. upon an award in the form of a special case. (1)

By contract of sale dated May 11, 1914, Duncan, Fox & Co., an English firm of merchants carrying on business in Liverpool (hereinafter called the claimants), sold to Schrempft & Bonke, also an English firm of merchants carrying on business in Liverpool (hereinafter called the respondents), through a firm of Hale & Paterson, brokers, acting for both parties, inter alia, "about three hundred (300) barrels June and/or July shipment Chilian honey per steamer and/or steamers, direct or indirect, with or without transhipment, at twenty shillings and sixpence

(1) [1915] 1 K. B. 365.

C. A. 1915

DUNCAN, FOX & CO. v. SCHREMPFT & BONKE.

(20/6) per cwt., cost freight and insurance (f.p.a.) to Hamburg, delivered weights, tare 12% no draft. Cost of landing and weighing to be borne by buyers . . . . Payment: Net cash in Liverpool in exchange for shipping documents on presentation of same and sellers to give buyers policy or policies of insurance covering two per cent. (2%) over the net invoice amount . . . . All disputes on this contract to be settled by arbitration in Liverpool as per the rules of the Liverpool General Brokers Association, Limited."

On June 28, 1914, the claimants shipped on board the German steamship *Menes* at Penco 300 barrels of honey, and received a bill of lading, dated June 28, 1914, for carriage of the goods by the said steamship from Penco to Hamburg, there to be delivered to the claimants or their assigns, they paying freight without deduction at the rate of 60*s.* per ton delivered, freight to be paid immediately on arrival of steamer, without any allowance of credit or discount, in Hamburg at the quoted highest rate of exchange for sight bills on London on the day of ship's entry at Custom House. By clause 16 of the conditions indorsed on the bill of lading it was provided that if the entering of the port of discharge should be considered unsafe by reason of war the master was to have the option of landing the goods at any other port more or less near to the port of destination at the shippers' risk and expense. By clause 24 all questions arising under the bill of lading were to be governed by the law of the German Empire and to be decided in Hamburg.

On July 28, 1914, Hale & Paterson wrote to the respondents that the sellers declared shipment of 300 barrels of honey per *Menes* in completion of the contract, and that letter was received by the respondents on the same or the following day.

On the evening of August 4, 1914, war was declared by Great Britain on Germany. On August 5, 1914, a Royal Proclamation against trading with the enemy was issued which warned all persons resident, carrying on business, or being in the British dominions "not to supply to or obtain from the said [German] Empire any goods, wares, or merchandise, or to supply to or obtain the same from any person resident, carrying on business, or being therein, nor to supply to or obtain from any person any

goods, wares, or merchandise for or by way of transmission to or from the said Empire, or to or from any person resident, carrying on business, or being therein, nor to trade in or carry any goods, wares, or merchandise destined for or coming from the said Empire, or for or from any person resident, carrying on business, or being therein," and all persons committing, aiding, or abetting any of the aforesaid acts were liable to penalties.

On the same date (August 5) Hale & Paterson received from the claimants a provisional invoice for the goods, and on the same day they sent it to the respondents with a covering letter of that date, which stated that the shipping documents for the parcel were ready and awaited the disposal of the respondents on the terms of the contract. The letter and invoice were received by the respondents. No other tender of documents was made than was contained in the said letter. No question was raised as to the sufficiency of the form of tender, and the arbitrators found as a fact that the respondents waived the necessity of any further or other tender. The documents tendered included the bill of lading and a policy of insurance on the goods. No question was raised with regard to any of the documents except the bill of lading, and the respondents agreed that the other documents were in order.

On August 7, 1914, the respondents telephoned to Hale & Paterson that they could not take up the documents as there was no valid bill of lading, and on the same day they wrote to Hale & Paterson confirming that statement.

The *Menes* had not arrived at Hamburg at the date of the tender of the documents. (1)

The claimants maintained that the documents tendered were in order, and they claimed payment. The respondents maintained that in the circumstances hereinbefore stated the bill of lading was not valid.

The dispute having been referred to arbitration, the arbitrators stated their award in the form of a special case, and in addition to the foregoing facts they found that the bill of lading was

(1) It was stated by counsel for the claimants that the *Menes* put into Las Palmas, a neutral port, after the outbreak of war, and was there still.

C. A. 1915

DUNCAN, FOX & Co. v. SCHREMPFT & BONKE.

received by the claimants as agents for the respondents and that the property in the goods passed to the respondents at shipment. If they had not so found, they stated that they should have been prepared to find that the property passed to the respondents on receipt by them of the provisional invoice.

They also found that the expression "delivered weights" contained in the contract had a well-known meaning in the trade in reference to contracts such as this, that it referred to the adjustment of the price and not to the time of payment, and that if on weighing the goods at the port of landing it should be found that the invoice of the goods was incorrect an adjustment of the purchase-money would be made if it had already been paid, and that this effect was to be given to the words "delivered weights" in the contract.

The question for the opinion of the Court was whether in the circumstances the tender of the bill of lading (with the other documents) was a good tender of documents under the contract. If that question was answered in the affirmative, the claimants were to recover 350*l.* 10*s.* 7*d.* as the price of the goods; if it was answered in the negative, the claimants were to recover nothing from the respondents.

Atkin J. held that the respondents were justified in refusing to accept the tender of the documents because the further performance of the contract would have involved a trading in goods destined for Germany in violation of the Royal Proclamation, and would therefore have involved illegal acts. (1)

The claimants appealed.

Maurice Hill, K.C., and *Barrington-Ward*, for the claimants. The duty of the seller of goods under a c.i.f. contract is stated by Hamilton J. in *Biddell Brothers* v. *Clemens Horst Co.* (2): "Firstly to ship at the port of shipment goods of the description contained in the contract; secondly to procure a contract of affreightment, under which the goods will be delivered at the destination contemplated by the contract; thirdly to arrange for an insurance upon the terms current in the trade which will be

(1) [1915] 1 K. B. 365. (2) [1911] 1 K. B. 214, at p. 220.

available for the benefit of the buyer; fourthly to make out an invoice as described by Blackburn J. in *Ireland* v. *Livingston* (1) or in some similar form; and finally to tender these documents to the buyer so that he may know what freight he has to pay and obtain delivery of the goods, if they arrive, or recover for their loss if they are lost on the voyage." The judgment of Hamilton J. was approved in the Court of Appeal by Kennedy L.J. (2), whose judgment was adopted in the House of Lords. (3) It was also followed in *Landauer* v. *Craven & Speeding Brothers* (4), *Orient Co.* v. *Brekke* (5), and *Groom* v. *Barber*. (6) The claimants have fulfilled all the requirements specified in the judgment of Hamilton J. The shipping documents must be valid documents, so far as regards the bill of lading, at the time of the shipment of the goods, and so far as regards the policy of insurance at the time when it is procured. If they are valid then, it is immaterial that, owing to some subsequent event happening, they are invalid at the date when tendered to the buyer. The seller does not warrant that the shipping documents will remain valid. Just as the goods after shipment are at the buyer's risk, so are the shipping documents. If the goods are lost during the voyage the buyer must pay the price on presentation of the documents. In a c.i.f. contract the seller does not undertake that the goods shall reach the port of destination: *Tregelles* v. *Sewell*. (7) The policy need only cover the value of the goods at the port of shipment: *Tamvaco* v. *Lucas*. (8) It is not a contract for the sale of documents which must be valid at the time when tendered. The decision of Scrutton J. in *Karberg & Co.* v. *Blythe & Co.* (9) that there must be a tender of documents which are valid at the time of tender is wrong. [*Lecky & Co.* v. *Ogilvy, Gillanders & Co.* (10) and *In re Olympia Oil and Cake Co. and Produce Brokers Co.* (11) were also referred to.]

(1) (1872) L. R. 5 H. L. 395, at p. 406.
(2) [1911] 1 K. B. 934, at pp. 952 et seq.
(3) [1912] A. C. 18.
(4) [1912] 2 K. B. 94, at pp. 104, 105.
(5) [1913] 1 K. B. 531, at p. 535.
(6) [1915] 1 K. B. 316, at p. 323.
(7) (1862) 7 H. & N. 574.
(8) (1861) 1 B. & S. 185.
(9) [1915] 2 K. B. 379.
(10) (1897) 3 Com. Cas. 29.
(11) [1915] 1 K. B. 233.

C. A. 1915

DUNCAN, FOX & Co. v. SCHREMPFT & BONKE.

Next, the learned judge was wrong in holding that the Proclamation of August 5, 1914, rendered the further performance of the contract illegal. The obligation of the claimants to ship the goods under a bill of lading and to take out a policy of insurance had been completed before the war broke out, and the only obligation which remained was to tender the documents to the buyers at Liverpool. The contract of carriage in the bill of lading was dissolved by the war: *Esposito* v. *Bowden* (1); *Karberg & Co.* v. *Blythe & Co.* (2); but the bill of lading was not dissolved as a document of title to the goods. The contract to deliver at Hamburg came to an end, and the war only made the carriage to Hamburg impossible of performance. The buyers can, under the Board of Trade licence of September 25, 1914 (3), obtain possession of the goods and pay the necessary freight, or they may wait until the end of the war and then claim their goods. It is admitted that the contract of May 11 was one which the parties could not have made after the outbreak of war. That does not, however, affect the right of the claimants in the circumstances to be paid the price of the goods sold. After the outbreak of war nothing remained to be done by the claimants under the contract of sale except to tender the documents to the buyers at Liverpool. There was nothing illegal in that. The use to which the purchasers might put the documents did not concern the sellers. There was no illegality in the mere handing over of the documents to the buyers. As between the parties to the contract, one of whom had to tender and the other to accept the documents, there was no question of any trading with the enemy contrary to the terms of the Proclamation. There was no trading in goods destined for the German Empire. They had ceased to be destined for that Empire when war broke out, and neither the claimants nor the buyers intended that the goods after the war should go to Germany. It is not material to consider when the property in the goods passed. That depends upon the circumstances of the case and the intention of the parties. The claimants are therefore entitled to recover.

(1) (1857) 7 E. & B. 763, at pp. 783, 784.

(2) [1915] 2 K. B. 379.

(3) See Manual of Emergency Legislation, 1914, p. 383.

[*Porter* v. *Freudenberg* (1) and *Sanday* v. *British and Foreign Marine Insurance Co.* (2) were also referred to.]

F. A. Greer, K.C., and *Greaves Lord*, for the respondents. In the first place, by reason of the outbreak of war on August 4 the contract of sale was dissolved because the further performance of it would have involved the commission of illegal acts on the part of one or of both of the parties to the contract. This is the ground upon which Atkin J. decided the case.

Treating the contract as a subsisting contract after the outbreak of war for the purpose of ascertaining whether the further performance of it would have been unlawful, it is clear that it would have involved illegal acts. It involved the transfer to the purchasers of the property in goods on board a German ship which at the time was destined for Germany. By the bill of lading the goods were deliverable to the order of the claimants, and therefore the property in the goods did not pass until the indorsed bill of lading was handed over to the buyers: Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 19.

On the outbreak of war the goods were "destined for" Germany within the meaning of the Proclamation of August 5, 1914. The Proclamation derived statutory force from s. 1, sub-s. 2, of the Trading with the Enemy Act, 1914 (4 & 5 Geo. 5, c. 87), which contemplated that the prohibitions in the Proclamation might go beyond what was forbidden by the common law or by any previously existing statute. Both parties knew that the destination of the ship was a German port. The further performance of the contract would have involved a trading in goods destined for the German Empire. The ultimate price to be paid for the goods depended upon the "delivered weights" at Hamburg. The Court will not enter into the question whether the dealing in the goods is for the benefit of a British subject.

Next, if the contract of sale is still in existence and binding upon both parties, the claimants were bound to tender to the buyers a valid contract for the carriage of the goods to Hamburg. The bill of lading must be a valid contract for the carriage of the goods at the time when it is tendered to the buyers. This is

(1) [1915] 1 K. B. 857, at p. 867. (2) [1915] 2 K. B. 781.

C. A. 1915

DUNCAN, FOX & Co. v. SCHREMPFT & BONKE.

assumed in the statement by Blackburn J. in *Ireland* v. *Livingston* (1) and by Hamilton J. in *Biddell Brothers* v. *Clemens Horst Co.* (2) as to the duty of the seller under a c.i.f. contract of sale. The outbreak of war put an end to the contract of conveyance: *Esposito* v. *Bowden* (3); and "when therefore the seller . . . . tendered documents and demanded the price, he tendered documents which had been contracts, but which were now, by considerations of public policy, void and unenforceable as regards any obligations of performance which would but for the war have been carried out after August 4": *Karberg & Co.* v. *Blythe & Co.* (4) The tender therefore was a bad tender and the claimants were not entitled to recover the price of the goods.

Barrington-Ward in reply.

SWINFEN EADY L.J. This is an appeal from the decision of Atkin J. upon an award of an arbitrator stated in the form of a special case.

The contract upon which the dispute has arisen is dated May 11, 1914, and was made in Liverpool through brokers acting for both parties, who are British subjects. [The Lord Justice read the contract as above set out.] The goods in question were shipped in Chile on board the German steamship *Menes* under a bill of lading for carriage to Hamburg, the freight to be payable without deduction at the rate of 60*s.* per ton delivered, the charges for weighing therefore being payable by the consignees. On July 28 the sellers gave notice to the buyers of appropriation of this consignment to meet the contract. On August 4 war was declared. On August 5 the provisional invoice was sent to the buyers with a letter stating that the shipping documents had arrived in this country and were at the disposal of the buyers on the terms of the contract. That letter was received by the buyers on the same day. They considered the matter until August 7, when they raised an objection and declined to proceed further with the contract or to pay against delivery of the shipping documents. Both on August 5 and 7, so far as we know, the ship was on the high seas in the Atlantic. We are told that soon after the outbreak

(1) L. R. 5 H. L. at p. 406.
(2) [1911] 1 K. B. at p. 220.
(3) 7 E. & B. at pp. 783, 784
(4) [1915] 2 K. B. at p. 391.

of war she put into Las Palmas, a neutral port, as a port of refuge, and that she is there still.

The objection taken on behalf of the buyers is that the contract, according to its terms, if carried out, would have involved illegal acts on the part of one or both of the parties. For the purpose of determining what the position of the respective parties would have been under the contract of May 11 we must treat the contract as if it were still in existence after the outbreak of war on August 4. The goods were at that date on the high seas destined for the German Empire. They had been shipped in a German steamer under a bill of lading which contained a contract of affreightment to carry the goods to Hamburg.

By the Proclamation of August 5 British subjects were warned, inter alia, "not to supply to or obtain from any person any goods, wares, or merchandise for or by way of transmission to or from the said [German] Empire," and they were further warned "not to trade in . . . . any goods, wares, or merchandise destined for or coming from the said Empire." It is clear that, apart from any question as to the contract of affreightment being dissolved or determined by the outbreak of war, these goods were at that time in course of transmission to the German Empire, and a dealing in the goods would have involved a "trading in goods, wares, or merchandise destined for the said Empire."

It was very properly conceded by Mr. Maurice Hill that the contract of May 11, having regard to its nature and terms, could not have been lawfully entered into after the outbreak of war. In my opinion it was not competent for either of the parties to carry out the contract after the outbreak of war, because to do so would have involved a trading with the enemy in breach of the Proclamation. There is a statement in the case that the arbitrators found that the property in the goods had already passed, that is to say, they found that the property passed to the buyers on shipment, and that, if they had not so found, they would have found that the property passed to the buyers on receipt by them of the provisional invoice. These points, however, were not pressed by Mr. Maurice Hill, and, as I understood him, he conceded, for the purposes of this case, that the property in the goods would not pass until the delivery of the indorsed

C. A. 1915

DUNCAN, FOX & Co. v. SCHREMPFT & BONKE.

Swinfen Eady L.J.

bill of lading. In these circumstances the further carrying out of the contract after the outbreak of war, namely, the delivery of the shipping documents and the payment of the price by the buyers, would have been a carrying out of a contract and a dealing in goods which would have constituted a trading therein forbidden by the Proclamation. In my opinion the contract of May 11 had been dissolved by the outbreak of war inasmuch as the further performance of it by either of the parties would have involved illegal acts. This is the ground upon which Atkin J. rested his decision.

A further point has been raised which it is unnecessary to consider, as the first point is sufficient to dispose of the case. The appeal must be dismissed.

PHILLIMORE L.J. I agree that this appeal should be dismissed. If we look simply at the terms of the contract, that is, look at it as a contract for the delivery of the goods at Hamburg, it is clear that the further performance of that contract became impossible after the declaration of war on August 4. If we look at the matter in that way simply, the sellers could not insist upon the purchasers taking any steps towards the further performance of the contract. If we look at it in another way, and accept the position, which I am prepared to accept, that under a c.i.f. contract the seller fulfils his obligations when he has shipped the goods as described therein and has tendered the shipping documents to the purchasers, the difficulty is only removed one stage, because, this ship being destined for a port in the German Empire, the documents which the sellers have to tender are documents the terms of which can only be fulfilled if the ship proceeds to the German port. Therefore in either view of the matter the further performance of the contract became impossible as being forbidden by the Proclamation of August 5 which has statutory force, and which may or may not go beyond the common law.

This leaves undecided the second question. For some reasons I should have liked the Court to have dealt with the second point also, but the first point, upon which Atkin J. based his judgment, is sufficient for the decision of the case, and it may

be wiser to let the other point wait until it is necessarily brought before the Court in some future case.

This contract, whether it be considered simply as a contract for the sale of honey to be delivered at Hamburg, or as a contract for the sale of honey to be delivered at Hamburg which would be performed by transferring documents themselves involving delivery at Hamburg, in either view involves a breach of the Proclamation of August 5, and upon this ground I think that the buyers were right in refusing to proceed further with the matter, and were entitled to resist taking delivery of the documents. I agree that the appeal should be dismissed.

BANKES L.J. I am of the same opinion. The parties entered into a contract of May 11, 1914, for the purchase and sale of a certain quantity of honey under a c.i.f. contract, which made the honey deliverable at Hamburg. War was declared between this country and Germany on August 4. On August 5 the shipping documents were tendered by the sellers to the purchasers, and on August 7 the purchasers refused to take up the documents and to pay the purchase price. In these circumstances the parties went to arbitration, the dispute being whether the purchasers were under an obligation to take up the documents and to pay the price.

Before Atkin J. two points were argued. First, it was said that under a c.i.f. contract the seller's only duty was to procure the necessary shipping documents, that is, the bill of lading and the policy of insurance, and if those documents were valid at the time when they were procured the seller was entitled to tender them to the purchaser and the purchaser was bound to accept them, even though some event had intervened which rendered the contract unenforceable. An interesting argument has been addressed to us upon that point. Atkin J. did not consider it necessary to decide it. Nor do I think it necessary for us to decide it having regard to the view which we entertain upon the other point.

The other point is that owing to the declaration of war it became illegal to do anything in further performance of the contract of May 11. Atkin J. so decided, and in my opinion his

C. A. 1915

DUNCAN, FOX & CO. v. SCHREMPFT & BONKE.

Bankes L.J.

decision was right upon this short ground. The contract was for delivery of the goods at Hamburg, and so long as it was a subsisting contract it seems to me to be manifest that the further performance of that contract, so far as it was unfulfilled at the date of the outbreak of war, would have involved a trading in goods destined for Germany. It therefore became impossible of further performance, and whether it is said that it became impossible to perform it, or that it was discharged, or dissolved, seems to me immaterial. Neither of the parties could call upon the other to do any act under the contract after the declaration of war. The acts remaining unperformed under the contract were the handing over of the documents and the payment of the price. To my mind it is immaterial whether the buyers had called upon the sellers to tender the documents or the sellers had called upon the buyers to pay for the goods. In either case the one was entitled to say to the other: "At the moment that you are requiring us to do this act the further performance of the contract has become impossible, and we are no longer under a legal obligation to do that which you call upon us to do."

Upon these grounds it seems to me that the decision of Atkin J. was right, and that the appeal should be dismissed.

Appeal dismissed.

Solicitors for claimants: *Chester, Broome & Griffithes, for Morecroft, Sproat & Killey, Liverpool.*

Solicitor for respondents: *G. H. Walker, for Weightman, Pedder & Co., Liverpool.*

W. F. B.

[IN THE COURT OF APPEAL.]

C. A.

1915

June 8, 9, 28.

FRATELLI SORRENTINO *v.* BUERGER AND ANOTHER.

Shipping—Charterparty—Effect of Sale of Ship while Charterparty still executory.

By a berth contract made between shipowners and charterers the former agreed that their ship, the *Rosalia*, should proceed as ordered to Odessa and there load a complete cargo to be delivered at another port. Before the *Rosalia* proceeded to Odessa the shipowners sold her to a company with the benefit of the berth contract, and the purchasers declared that they accepted the execution of that contract. Notice of the sale was given to the charterers. The *Rosalia* was tendered at Odessa to the charterers, but they refused to load her, contending that by the sale of the ship the shipowners had put it out of their power to perform the contract. The original owners claimed damages for breach of contract to load, and the dispute was referred to arbitration under a clause in the contract. The arbitrator found as facts that the *Rosalia* was duly tendered under the berth contract and that both the original owners and the purchasers were always ready and willing to do all things necessary on their part towards the fulfilment of the contract, and that the vessel was not loaded solely by reason of the charterers' refusal to load her:—

Held, that upon these findings of fact, which meant that the original owners were always ready and willing to perform the contract personally and not merely through the purchasers, the original owners had not put it out of their power to perform the contract, and that the charterers were liable in damages for refusing to load the vessel.

Decision of Atkin J. [1915] 1 K. B. 307 affirmed.

APPEAL of the charterers from the decision of Atkin J. upon an award in the form of a special case stated by an umpire. (1)

The facts are shortly stated in the above head-note, and are fully set out in the report of the case in the Court below. In consequence of the ground upon which the Court of Appeal decided the case it is unnecessary to restate the facts as there set out, and recapitulated in the judgments in the Court of Appeal, or to set out the arguments.

Adair Roche, K.C., and *F. D. Mackinnon, K.C.*, for the charterers, Buerger and Teper.

Leck, K.C., and *R. A. Wright*, for the claimants, Fratelli Sorrentino.

Cur. adv. vult.

(1) [1915] 1 K. B. 307.

C. A. 1915

FRATELLI SORRENTINO v. BUERGER.

June 28. SWINFEN EADY L.J. The first point raised by the charterers and submitted by the umpire as a question of law is that, by the sale of the steamship, Fratelli Sorrentino put it out of their power and were not able to perform the contract. Counsel for the charterers conceded that a shipowner might sell the ship during the currency of a charterparty, but he contended that he could not give possession of it, as thereby he prevented himself from carrying out the contract. But the arbitrator has negatived the fact that Fratelli Sorrentino put it out of their power to carry out the contract. On the contrary, he finds that the vessel was duly tendered to the charterers under the berth contract, and that both Fratelli Sorrentino and the Adriatica (the purchasers of the vessel) were always ready and willing to do all things necessary on their part towards the fulfilment of the contract; and that the sole reason why the vessel was not loaded was that the charterers refused to load her. It is clear from the terms of the contract of sale that the Adriatica had notice of the current berth contract when they agreed to buy the vessel, and as it was a beneficial contract (1) they were desirous of carrying it out; and Fratelli Sorrentino were also desirous of carrying it out, and between them they could have arranged to carry it out in any manner that the charterers desired, and the umpire finds that they were ready and willing to do so; and when the vessel was tendered there was ample time to make any necessary arrangements for the contract being carried out by Sorrentinos, as the date for cancellation was not until October 25.

[The Lord Justice then dealt with the contention that the letter of October 11 from Fratelli Sorrentino's London brokers amounted to a renunciation of the contract, and that the letter meant that Fratelli Sorrentino would not carry out the contract, but that the charterers must accept the liability of the Adriatica in substitution for that of Fratelli Sorrentino under the contract. In his opinion that was not the meaning and effect of the letter and it did not amount to a renunciation of the contract, and there was no ground for the contention that

(1) The Lord Justice in his statement of the facts said that "between the date of the berth contract and the middle of October the fall in the Russian freight market was approximately 3*s.* per ton."

Fratelli Sorrentino repudiated their obligation to the charterers. The latter were not entitled to treat it as a renunciation absolving them from the performance of the contract on their part. Fratelli Sorrentino could not have substituted the liability of the Adriatica for their own without the consent of the charterers, and there had been no such claim by Fratelli Sorrentino.]

It was urged by the appellants that the finding by the umpire, that Sorrentinos and the Adriatica were always ready and willing to do all things necessary on their part towards the fulfilment of the contract, merely meant that, so far as Sorrentinos were concerned, they were willing to perform their contract through the Adriatica. I see no ground for thus restricting the finding of the umpire. I read his award as meaning that Sorrentinos were willing to carry out the contract personally, if the charterers so desired, and not merely vicariously; indeed, that both Sorrentinos and the Adriatica were each ready and willing to carry out the contract, and were desirous of doing so, and that the reason why the vessel was not loaded was not in consequence of any unwillingness or inability of either Sorrentinos or the Adriatica to carry out the berth contract in any proper manner which the charterers might desire, but solely by reason of the charterers' refusal to load her, the fall in freights affording a sufficient explanation of the attitude which they took up. The berth contract had become an onerous one in October, and the charterers, by their agents' letter of October 13, did not rely upon any renunciation by Sorrentinos or refusal to carry out the contract, but contended that the mere sale of the vessel had put it out of their power to do so. It has not been contended in this Court that the mere sale of the vessel put an end to the berth contract. It is possible that at all material times the legal ownership of the vessel remained in Sorrentinos, as it appears that a notarial document was necessary to transfer this, and there is no mention of any such document having been executed. However that may be, the charterers' defence to the action was that the shipowners had put it out of their power to perform the contract at the date when they refused or omitted to load, and the umpire finds the contrary in fact, and decides that the vessel was duly tendered under the berth contract.

C. A. 1915

FRATELLI SORRENTINO v. BUERGER.

Swinfen Eady L.J.

The ground upon which the learned judge below decided this case was stated by him as follows (1): "I have the finding that both vendors and purchasers were ready and willing to perform all the obligations under the contract. It seems to me, therefore, that the original owners are not precluded from carrying out the contract by the mere transfer of the ship with the benefit of the charterparty."

I agree with this view, and am of opinion that the appeal fails and should be dismissed.

PHILLIMORE L.J. It seems to me that the berth contract into which the brothers Sorrentino entered with Buerger and Teper was one the obligations of which they had to discharge, and could not transfer to others. It further seems to me that they could not claim, as against the will of the charterers, to perform it by somebody else, and that they must retain at all material times the capacity to perform it.

If it were a question whether their contract was one which fell within the view of the Divisional Court in *British Waggon Co.* v. *Lea* (2), or which fell within the language of the Privy Council in *Dimech* v. *Corlett* (3), I think it falls within the latter category. And if (as I think) Atkin J. meant to decide otherwise, I must disagree with him. One has then to consider whether the acts of the brothers Sorrentino amounted to a repudiation or renunciation of the contract. It is suggested in the case that the sale of the steamship amounted to a repudiation of the contract. I do not think this necessarily follows. A sale coupled with the parting with the possession of the ship would. But, notwithstanding the sale, the vendor might by arrangement retain sufficient possession to carry out the berth contract, or there might be a redemise of the ship to him.

[The Lord Justice then dealt with the question whether the letter of October 11 amounted to a repudiation or renunciation by Fratelli Sorrentino of the contract so as to entitle the charterers to treat it as a breach within the decision in *Hochster* v. *De la Tour*. (4) The mere announcement of the sale of the

(1) [1915] 1 K. B. at p. 315.
(2) (1880) 5 Q. B. D. 149.
(3) (1858) 12 Moo. P. C. 199, at p. 223.
(4) (1853) 2 E. & B. 678.

ship did not amount to a repudiation. Whether the rest of the letter amounted to a repudiation was a further question and prima facie one for the umpire. The other members of the Court thought that the finding of the umpire that Fratelli Sorrentino and the Adriatica were always ready and willing to perform their contract amounted to a finding that there was no repudiation, and on the whole he agreed. He could have wished that the umpire had set out the documents in full, but if they were left to the special case as it stood he did not see that they could disagree with the umpire's finding.]

I may add that I think that the point which was really insisted upon at the arbitration was that the mere sale of the ship, plus the communication of this sale to the charterers, amounted to a repudiation or renunciation; and this, as I have said, is to lay too great a stress on the bare sale.

On the whole I agree that the appeal fails.

BANKES L.J. Before the arbitrator the appellants contended as a matter of law that by the sale of the steamship the respondents had put it out of their power to perform, and were not able to perform, the contract. The same point was argued before this Court. It was said that the obligations undertaken by a shipowner under a charterparty of his ship are in their nature personal obligations and non-assignable, and that a shipowner cannot substitute any other person to fulfil the obligations he has undertaken under the charterparty, and that any sale of a vessel by a shipowner while she is under charter by which the shipowner parts with the possession and control of the vessel is a breach of the charterparty entitling the charterer to rescind. It was further said that the sale of the vessel by the respondents in the present case was a sale of this character.

I do not think that any general rule can be laid down applicable to all charterparties. Each case must depend upon the language of the charterparty and its own particular circumstances. It can, however, I think, be stated as a general rule that where a charterparty contains obligations which can from their nature only be performed by the party himself who entered into the contract, that party cannot, by parting with the ship or otherwise,

C. A. 1915

FRATELLI SORRENTINO v. BUERGER.

Bankes L.J.

do anything which puts it out of his power to fulfil the obligations personally. He has no right to substitute any other person to perform those obligations in his place. It is not, however, every parting with a ship, whether by sale or otherwise, while she is under charter which puts it out of the power of the vendor to perform the obligations (if any) which he has undertaken to perform personally. For instance, possession may not have to be given under the contract of sale until after the charter is performed, or the vendor may by express terms reserve the right to perform personally the obligations of the charter, or the vendor and the purchaser may agree, without precisely defining how it is to be done, that the vendor shall retain the right in spite of the sale of the vessel of satisfying any requirement of the charterer as to personal performance by the vendor of any of the obligations of the charterparty.

In view of what has happened in this case I do not think that the point taken by the appellants is open to them. The case is peculiar on the facts, because the appellants elected to rescind the contract upon the mere information contained in the letter of October 11. This letter intimated (as no doubt the intention was) that the purchasers would carry out the charterparty, but it contained no statement to the effect that the respondents would not do so if required, or that they had put it out of their power to do so. It was in the interest both of the vendors and of the purchasers that nothing should be done to jeopardize the berth contract, and there was plenty of time for these parties, had they received an intimation that the appellants objected to the purchasers performing the contract, to have put matters right.

[The Lord Justice said that the arbitrator found that both the respondents and the purchasers protested against the charterers' statements in the letter of October 13, and insisted that the contract should be fulfilled; and that both the respondents and the purchasers were always ready and willing to do all things necessary on their part towards the fulfilment of the contract, and that the vessel was not loaded solely by reason of the charterers' refusal to load her. He (the Lord Justice) could not read the findings as meaning that the respondents were

ready and willing to perform the contract by the purchasers as their substitutes; and he did not think that Atkin J. so read them.]

The argument in the Court below was not confined to the questions which I have so far dealt with. It was no doubt argued that the contract was one of the class that could be performed by deputy. With that argument, so far as it relates to all the obligations in this particular berth contract, I am not prepared to agree, but I do not propose to discuss it because it seems to me to be immaterial. I find Atkin J. saying (1): "If they had sought to put upon the charterers the obligation to have the charterparty performed by the purchasers and by them only, I am inclined to think that the charterers would have been justified in saying that there had been a repudiation of the owners' obligations under the contract. That view, however, is not put forward and I have not to decide it"; and again later (2) the learned judge refers to and relies on the finding of the arbitrator as set out in the case. I think that the learned judge only dealt with the argument which was founded on the case cited to him for the purpose of indicating his view that it was not of the essence of the contract that the original owners of a vessel under charter should remain owners until the end of the contract. I read the learned judge's judgment as deciding what I have already indicated, namely, that on the facts of this particular case the point of law taken by the appellants does not arise.

Appeal dismissed.

Solicitors for claimants: *Parker, Garrett & Co.*
Solicitors for charterers: *W. & W. Stocken.*

(1) [1915] 1 K. B. at p. 313. (2) [1915] 1 K. B. at p. 315.

W. F. B.

1915
June 24.

EARL OF DERBY *v.* AYLMER (Surveyor of Taxes).

Revenue—Income Tax—Sched. D—Trade—Deduction—Plant—Wear and Tear—Business of Horse Breeding—Stallions' Fees—Diminution in Value owing to Increasing Age—Customs and Inland Revenue Act, 1878 (41 *&* 42 *Vict.* c. 15), *s.* 12.

Sect. 12 of the Customs and Inland Revenue Act, 1878, provides that in assessing the profits of a trade or concern in the nature of trade chargeable under Sched. D the Commissioners shall allow a reasonable deduction "as representing the diminished value by reason of wear and tear during the year of any machinery or plant used for the purposes of the concern":—

Held, that a stallion which earns fees for its owner, the proprietor of the business of a stud farm, by serving mares belonging to other persons is not "plant" within the meaning of s. 12, nor is the annual decrease in the value of the stallion, due solely to the effluxion of time, a diminution in its value "by reason of wear and tear" within the meaning of that section.

Case stated under 43 & 44 Vict. c. 19, s. 59, by the Commissioners for the Special Purposes of the Income Tax Acts.

At a meeting of the Commissioners for the Special Purposes of the Income Tax Acts held at Cambridge on December 18, 1913, for the purpose of hearing appeals, the Earl of Derby (hereinafter called the appellant) appealed against an assessment of 2000*l.* for the year ended April 5, 1914, made upon him by the Commissioners for the Special Purposes of the Income Tax Acts, under 5 & 6 Vict. c. 35, s. 100, Sched. D, case 1, and 16 & 17 Vict. c. 34, s. 2, Sched. D, in respect of the profits or gains derived by him from what are termed "stallion fees."

The appellant owned two stallions at stud, namely, Chaucer and Swynford, valued respectively by him at 20,000*l.* and 40,000*l.* These two stallions were kept at the appellant's stud farm and breeding establishment, where he also kept a varying number of brood mares, but these mares did not enter into the present case in any way, the only question in this case being the amount of assessable profits, if any, earned through the serving of the mares of other owners by the appellant's two stallions at fixed fees.

The appellant did not buy either stallion, having bred them

1915

DERBY (EARL) v. AYLMER.

both. No evidence was put before the Commissioners to show how the above-mentioned values had been arrived at, but the appellant stated that the values were estimated with reference to the prices which, in his opinion, the stallions would fetch if bought and sold in the ordinary way. The respondent did not question the bona fides of these estimates.

The appellant admitted that the values had not been arrived at by reference to "cost" or "outlay," as neither stallion had at any time been bought or sold.

The appellant and the respondent agreed that the appellant was carrying on a business the profits of which should be assessed under case 1 of Sched. D.

The appellant produced and put in as evidence an account for the one year ended December 31, 1912.

The appellant contended:

(*a*) that he was entitled to bring in at the beginning and end of such account the value of the two stallions, and

(*b*) that it was a just and reasonable method of deduction to allow him to write down the value of the stallions in his accounts by a uniform annual rate of depreciation based on the normal useful life of stallions, which normal life he estimated at eighteen years.

The appellant had drawn up the said account in the manner which he contended was correct, as set out in the preceding paragraph of this case, and as a result the account showed a balance being loss of 1282*l.* 15*s.* 7*d.*

The respondent contended that the account improperly included the estimated value of the two stallions; that the stallions were in no sense a stock in trade, and that the value of such stallions should be excluded altogether from the account; and further that the stallions were not machinery or plant within the meaning of s. 12 of the Customs and Inland Revenue Act, 1878 (1), and that there were no provisions in the Income Tax

(1) Customs and Inland Revenue Act, 1878 (41 & 42 Vict. c. 15), s. 12: "Notwithstanding any provision to the contrary contained in any Act relating to income tax, the Commissioners for general or special purposes shall in assessing the profits or gains of any trade, manufacture, adventure, or concern in the nature of trade, chargeable under Schedule (D.), or the profits of any concern chargeable by reference to

1915

DERBY (EARL) v. AYLMER.

Acts which would justify the Commissioners in regarding the stallions as a fit subject for a depreciation allowance.

If the value of the stallions was excluded from the account it showed a profit of 1405*l.* 8*s.* 7*d.*, and the respondent contended that it was to this figure that the assessment of 2000*l.* should be reduced.

The Commissioners considered that the contentions of the respondent were right, and accordingly they reduced the assessment in the sum of 2000*l.* to the sum of 1405*l.*

At the request of the appellant the Commissioners stated this case for the opinion of the Court.

If the decision of the Court was in favour of the appellant the case was to be remitted to the Commissioners to adjust the amount of the assessment in accordance therewith.

Scott Fox, K.C., and *Cuthbertson*, for the appellant. It is admitted that the appellant carries on business as a horse breeder. He is therefore entitled under s. 12 of the Customs and Inland Revenue Act, 1878, to a reasonable deduction as representing the diminished value by reason of wear and tear during the year of any "plant" used for the purposes of the business. In *Blake* v. *Shaw* (1) Wood V.-C. said: "In most cases the word 'plant' is used to describe something which, if not in direct contrast to stock, is at any rate of an entirely different nature. All the matters permanently used for the purposes of a trade, as distinguished from the fluctuating stock, are commonly included in the term 'plant.' It consists sometimes of things which are fixed, as, for example, counters, heating, gas, and other apparatus and things of that kind, and in other cases of horses, locomotives, and the like, which are in this sense only fixed that they form a part of the permanent establishment intended to be replaced when dead or worn out, as the case may be." Thus, it was decided that horses may form part of the plant of the

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the rules of that schedule, allow such deduction as they may think just and reasonable as representing the diminished value by reason of wear and tear during the year of any machinery or plant used for the purposes of the concern, and belonging to the person or company by whom the concern is carried on; . . . ."

(1) (1860) John. 732.

business of a wharfinger and warehouseman: *Yarmouth* v. *France*. (1) A stallion is clearly part of the plant of the business of a horse breeder. As each year passes the value of a stallion diminishes by reason of its increasing age; that is a diminution "by reason of wear and tear" within the meaning of s. 12. The appellant is therefore entitled to the deduction claimed. [*Usher's Wiltshire Brewery* v. *Bruce* (2) was also referred to.]

Sir F. E. Smith, S.-G., and *T. H. Parr* (*Raymond Asquith* with them), for the respondent. It is not denied that a horse may for some purposes be regarded as part of the plant of a business, but the question must always depend on the language of the statute in which the word "plant" is used. *Yarmouth* v. *France* (1) was decided under the Employers' Liability Act, 1880. On the other hand in *London and Eastern Counties Loan and Discount Co.* v. *Creasey* (3) it was held that a cab horse is not plant within the meaning of the Bills of Sale Acts. Neither of those decisions is of assistance in deciding the question whether the appellant's stallions are plant within the meaning of s. 12 of the Customs and Inland Revenue Act, 1878. The language of that section, when considered as a whole, shows that the word "plant" cannot have been intended to include such things as stallions kept by a horse breeder; for in the case of plant lent to a person the section speaks of "the burden of maintaining and restoring" it, which expressions show that the word "plant" is used as meaning something analogous to machinery. The word "plant" is also to be found in s. 26, sub-s. 2, of the Finance Act, 1907, which deals with the allowance for income tax purposes of deductions for wear and tear. That section refers to "expenditure in the nature of capital expenditure on the machinery or plant by way of renewal, improvement or reinstatement." This language shows that the word "plant" in the Income Tax Acts means something which can be renewed, improved, or reinstated. A stallion cannot undergo any of those processes. Further, under s. 12 the deduction is to be in respect of the diminished value by reason of "wear and tear during the year," which means the decrease in value of an article by reason of its user. Machinery and plant do not lose

(1) (1887) 19 Q. B. D. 647. (2) [1915] A. C. 433.
(3) [1897] 1 Q. B. 768.

1915

DERBY (EARL) v. AYLMER.

any value, apart from user, merely because they become older. The decrease in the value of a stallion due to its increasing age is not a diminution in value by reason of wear and tear within the meaning of s. 12.

Scott Fox, K.C., replied.

ROWLATT J. I am of opinion that this appeal fails. The question which I have to determine arises in this way. The appellant Lord Derby is the owner of two valuable stallions, which earn fees for him by serving the mares belonging to other people which are sent to the appellant's establishment for this purpose. The appellant sets off against the fees thus earned the expenses of keeping the stallions, of maintaining the mares while at the appellant's premises, and other expenses of that kind. It is immaterial for the purposes of this case that these stallions also perform services in the appellant's own breeding establishment and are of some value to him from that point of view. For the purposes of this case the stallions are to be regarded as if they did nothing but what is mentioned in the case, the accounts having been adjusted in order to segregate that question.

The deduction which the appellant claims to be entitled to make is the deduction of some annual amount representing the running off of the value of the horses year by year by reason of the advance of time and the consequent diminished prospect of their life. The horses will only last for eighteen years; at the end of that time they will be dead or worth nothing; and the appellant seeks to have an allowance made to him to represent that loss which is going on all the time and which tends to diminish the profits which he makes out of the horses.

It is not disputed that from a business point of view some such allowance would be made by any one who wanted to ascertain the annual profits of the business; but it is a commonplace of income tax law that, apart from s. 12 of the Customs and Inland Revenue Act, 1878, such an allowance is not permissible. The original view of the Income Tax Acts, the tax at first being a very small one, was that a man's whole income year by year was subject to the tax, and no question was entertained as to how long that income would last or how long the man would be

able to earn it. I have to deal with this case solely from the point of view of the Income Tax Acts, and I have not got to consider how the question would be regarded by a qualified accountant.

I wish to state exactly what it is that I have to decide. I am not bound to decide whether a horse can ever be considered as plant or machinery for the purposes of the Income Tax Acts and of the particular section in question. I do not decide whether horses kept for traction in a business are, or are not, plant. I do not express an opinion either way. I do not decide whether horses ought to be treated as implements so that a carrier, for example, who keeps a number of horses ought to have an allowance for the average amount expended annually in keeping up his stock of horses, under the third rule applicable to the first case under Sched. D. I am not deciding whether in the present case the cost of insuring these horses would be an expense wholly and exclusively laid out on the business within the first rule applying to both the first and second cases under Sched. D. The question which I have to decide is whether the appellant brings this case within the words and true meaning of s. 12 of the Act of 1878. That section authorizes such deduction as the Commissioners may think just and reasonable as representing the diminished value by reason of wear and tear during the year of any machinery or plant. The section therefore applies to plant which has a diminished value by reason of wear and tear during the year, that is to say, plant the use of which in the business by wearing it out diminishes its value at the end of the year. The section is obviously applicable to anything like machinery which is being worn out by use, and which but for use would remain undiminished in value, apart from the access to it of deleterious influences such as rust or anything of that kind, and apart from changes in fashion. That is the sort of thing the scheme of the Act applies to, and in considering the application of the word "plant" one must bear in mind that it must be plant which has a diminished value after a year by reason of wear and tear during the year. It is not necessary to decide whether a horse used for traction is plant in that sense or not, but I am clearly of opinion that the diminished value of a breeding animal due merely to the

1915

DERBY (EARL) v. AYLMER.

Rowlatt J.

fact that having lived a year it is a year nearer to its end, and therefore is from that point of view less valuable, is not within the section. You need not take only the case of an animal; you may take the case of the value of a prolific tree. That is an article which is not worn out by use, but the life of which lasts for only a limited term of years. As the years go on you take the produce and reproduction of the animal or the tree, but when the years come to an end the animal or the tree or whatever it may be dies or is killed because it is no longer worth keeping. The diminished value of an animal or a tree by reason of the effluxion of time is not diminished value by reason of wear and tear; it is simply diminished value because money has been invested in a wasting source of production.

I have been strongly confirmed in my view as to the meaning of this section by the language of certain other sections to which the Solicitor-General has referred. I do not propose to go through them, but if the latter part of s. 12 of the Act of 1878, and s. 26, sub-s. 2, of the Finance Act, 1907, are looked at, I think abundant confirmation is found for the meaning which I have put in this connection upon the operative words of s. 12. As I think that this case has not been brought within s. 12, the appeal must be dismissed.

Appeal dismissed.

Solicitors for appellant: *Ruston, Clarke & Co., for A. H. & A. Ruston, Newmarket.*

Solicitor for respondent: *Solicitor of Inland Revenue.*

F. O. R.

GARSTON OVERSEERS *v.* CARLISLE (SURVEYOR OF TAXES). 1915

June 24.

Revenue—Income Tax—Banking Account—Interest on Credit Balance of Current Account—"Yearly Interest"—Income Tax Act, 1842 (5 & 6 *Vict.* c. 35), *s.* 105.

The overseers of the poor for a certain district kept a current account with a bank, into which they paid the amounts collected by them as poor rate, and out of which from time to time they made the payments for which they were liable. Under a long-standing arrangement with the bank interest was allowed by the bank half-yearly at an agreed rate, without deduction of income tax, calculated upon the daily balances standing to the credit of the overseers.

The overseers, contending that they were trustees for charitable purposes only within s. 105 of the Income Tax Act, 1842, claimed an exemption from income tax in respect of the interest on the ground that it was "yearly interest" within that section. On a case stated raising this latter question only:—

Held, that the interest was not "yearly interest" within s. 105.

CASE stated under 43 & 44 Vict. c. 19, s. 59, by the Commissioners for the Special Purposes of the Income Tax Acts.

The appellants, the overseers of the poor for the township of Garston, gave notice of appeal to the Commissioners for the Special Purposes of the Income Tax Acts against certain assessments made upon them under Sched. D of the Income Tax Acts by the additional Commissioners for the division of Prescot in the county of Lancaster in respect of bank interest in the following amounts and for the following years, namely:—

£	s.	d.				
66	10	0	for the year ending		April 5,	1910.
20	0	0	„	„	„	1911.
58	0	0	„	„	„	1912.
84	0	0	„	„	„	1913.
87	0	0	„	„	„	1914.

The duties on these assessments had not been paid to the Revenue.

A meeting of the said Commissioners was held on February 27, 1914, for the purpose of hearing the appeal.

At the hearing a claim of exemption from income tax was made in respect of the bank interest supported by an affidavit made by Mr. Samuel Brookfield, an assistant overseer. The

1915

GARSTON OVERSEERS v. CARLISLE.

claim purported to be made under s. 105 of the Income Tax Act, 1842 (1), on the ground that the appellants were trustees for charitable purposes only, and that the interest was applied for charitable purposes only within the meaning of that section.

The appellants were about to open their case when Mr. Hillman, an inspector of taxes, on behalf of the respondent, objected that the question to be dealt with was one that could not be adjudicated upon by way of an appeal, but was a claim of exemption under s. 105 of the Income Tax Act, 1842, and further that any determination by the Commissioners under that section would be final, and no case could be stated under s. 59 of the Taxes Management Act, 1880.

The appellants demurred to this proposition on the ground that all taxpayers, apart from any other remedy that might be open to them, possessed a statutory right to appeal against any assessment that might be made upon them, and to carry their case into the High Court, if not successful, upon a point of law in their appeal to the Commissioners.

After some discussion of this point it was agreed that, without prejudice to the aforesaid contentions, the Commissioners should let the case proceed as if it were an appeal.

The facts were as follows:—

The appellants were appointed under the Local Government Act, 1894, by the corporation of the city of Liverpool overseers for the township of Garston in the union of West Derby within the said city. They were appointed overseers in March of each year. Their duties included (inter alia) that of collecting the poor rates in the township of Garston. The amounts collected by them as poor rate were paid into an account kept in the

(1) Income Tax Act, 1842 (5 & 6 Vict. c. 35), s. 105: "Provided always, that any corporation, fraternity, or society of persons, and any trustee for charitable purposes only, shall be entitled to the same exemption in respect of any yearly interest or other annual payment chargeable under Schedule (D.) of this Act, in so far as the same shall be applied to charitable purposes only, as is hereinbefore granted to such corporation, fraternity, society, and trustee respectively in respect of any stock or dividends chargeable under Schedule (C.) of this Act, and applied to the like purposes; and such exemption shall be allowed by the Commissioners for special purposes, on due proof before them; . . . ."

names of the overseers for the time being with Parr's Bank, Limited, at Garston. The account was a current account out of which the appellants from time to time made the payments for which they were liable.

The banking account referred to in the previous paragraph had been running for at least fifteen years, and, under a long-standing arrangement with the bank, interest was allowed by the bank, without deduction of income tax, half-yearly upon the amounts standing to the credit of the appellants, and the interest was at the end of each half-year added to the account. It was upon the amounts of interest added to the account in this way that the assessments had been made. The bank also charged the appellants a commission upon the account.

The interest allowed to the appellants was calculated upon the daily balances, however large or small, standing to the credit of the appellants at a rate 1 per cent. less than the current rate of the Bank of England, and varied from time to time with the rate. The commission charged by the bank was calculated upon the turnover of the account.

The only rate which was levied and collected by the appellants in the township of Garston was the poor rate. Under the Consolidated Orders Amendment Order, dated February 26, 1866, two orders were made in each year by the guardians of the West Derby Union on the appellants as overseers for the payment to the treasurer of the guardians of such sums as might be required by them from the township of Garston for the coming half-year for the relief of the poor of the township, and for the contribution of the township to the common fund of the union, and for any other expenses chargeable by the guardians on the township. These two orders were issued one in April and another in October of each year. The orders directed payment by the overseers of the contribution in three instalments in each half-year at the dates therein mentioned. The appellants estimated the total amount which would be required for the ensuing whole year and made a poor rate for the whole year. They also included in the poor rate the amount of the various contributions which were levied by the council of the city of Liverpool by separate precepts under various statutory authorities.

1915

GARSTON OVERSEERS v. CARLISLE.

The poor rate was payable by the ratepayers on demand, but in practice the overseers accepted the rate in irregular instalments, if they were satisfied that a ratepayer was unable to pay the whole sum at once. The rate when collected by the overseers was paid by them into the bank account from time to time as and when received.

Payments towards the contribution required by the guardians of the West Derby Union were remitted by the appellants to the treasurer of the union by cheque on the account three times in each half-year on dates named in the order. Each respective contribution required by the council of the city of Liverpool was remitted to them by cheque on the same account at the date mentioned in each respective precept.

In these circumstances the appellants contended that the interest in question was yearly interest, and that they were entitled to claim relief from income tax under s. 105 of the Income Tax Act, 1842.

The inspector of taxes on behalf of the surveyor of taxes, without prejudice to the contention that the question was one which could not be adjudicated upon by way of an appeal, contended, inter alia, that the interest in question was not yearly interest; that the Special Commissioners had no power to deal with an application under s. 105 at a personal hearing; and that the appellants were not a corporation, fraternity, or society of persons or trustees for charitable purposes only, and that the interest was not applied to charitable purposes only.

The Commissioners were of opinion that the interest received by the appellants was similar in character to the interest received by the respondents in the case of *Matthews* v. *Cork County Council* (1), and they determined that the interest forming the subject of the assessments appealed against was not yearly interest within the meaning of s. 105 of the Income Tax Act, 1842, and they confirmed the assessments.

At the request of the appellants the Commissioners stated this case for the opinion of the Court, on the assumption that they had power to do so, and without prejudice to the contention of the inspector of taxes, as above stated.

(1) [1910] 2 I. R. 521.

Montgomery, K.C., and *A. M. Latter*, for the appellants. The facts stated in the case show that the arrangement as to this payment of interest has been in existence for many years, and it may be assumed that it will continue. The question is whether the interest is "yearly interest" within the meaning of s. 105 of the Income Tax Act, 1842. It is admitted that the words have the same meaning in that section as in s. 40 of the Act of 1853 (16 & 17 Vict. c. 34). Interest is yearly interest if the debt in respect of which it is paid is one which may extend beyond the period of one year. In *Bebb* v. *Bunny* (1) Wood V.-C. held that the expression "yearly interest" included any interest which may be, or become, payable de anno in annum, though accruing de die in diem. *Bebb* v. *Bunny* (1) was followed in *Davies* v. *Craven*. (2) *Goslings & Sharpe* v. *Blake* (3) does not apply to this case, for the decision there was merely that interest on a loan for less than a year is not yearly interest. In the present case the debt of the bank to the appellants extends over the year, and it is immaterial that the amount may vary during the year. The question in *Matthews* v. *Cork County Council* (4) was not as to the meaning of "yearly interest" but of the words "interest of money" in Sched. D of the Income Tax Act, 1853, and, therefore, that case is not in point. [They also referred to *Leeds Permanent Benefit Building Society* v. *Mallandaine* (5); *De Peyer* v. *Rex* (6); *In re Cooper* (7); *Farmer* v. *Scottish North American Trust* (8); *Gateshead Corporation* v. *Lumsden*. (9)]

Sir F. E. Smith, S.-G., and *T. H. Parr* (*Raymond Asquith* with them), for the respondent, were not called upon.

ROWLATT J. The appellants, the overseers of Garston, contend that they are a "corporation, fraternity, or society of persons," or trustees "for charitable purposes only," and that, therefore, under s. 105 of the Income Tax Act, 1842, they are entitled to claim exemption from the payment of income tax in respect of certain interest which they receive.

(1) (1854) 1 K. & J. 216.
(2) [1907] 2 Ch. 448.
(3) (1889) 23 Q. B. D. 324.
(4) [1910] 2 I. R. 521.
(5) [1897] 2 Q. B. 402.
(6) (1909) 100 L. T. 256.
(7) [1911] 2 K. B. 550.
(8) [1912] A. C. 118.
(9) [1914] 2 K. B. 883.

1915

GARSTON OVERSEERS v. CARLISLE.

Rowlatt J.

Before dealing with the question raised by the case I desire to state the footing upon which this matter comes before me. Applications for exemption under s. 105 are not the subject of appeals to the Commissioners or of appeals to this Court by way of a case stated by the Commissioners. But that point has not been insisted upon in this case. The Commissioners have decided that the payments in question are not yearly interest, and they have not dealt with the question whether the appellants are trustees for charitable purposes, and I understand that for the purposes of this case only the parties agree that if I, or the Court of Appeal, were to decide that it is yearly interest, then the matter is to be dealt with upon the footing that the appeal was rightly taken to the Commissioners.

I will now deal with the substance of the appeal. Sect. 105 seems to me, quite clearly, upon the face of it, to have been designed to exempt from income tax the interest paid on investments held by corporations or trustees for charitable purposes. At first sight it strikes one as an ingenious contention that the overseers are trustees for charitable purposes. I do not in the least want to prejudice that question. It may be that they are, or it may be that they are not. But the exemption given by the section is given in respect, as I read it, of the yearly interest on the investments of such persons for the purposes for which they exist. That is how the section strikes me, and it is not really a matter of controversy in this case, because Mr. Montgomery, who has argued the case very exhaustively and clearly, admitted that he thought yearly interest in s. 105 means the same as yearly interest in s. 40 and other sections of the Act of 1853. The cases under those sections are, therefore, the cases which must be looked at as throwing light upon what is yearly interest under this section. The broad result of the decisions in those cases is, I think, that yearly interest means, substantially, interest irrespective of the precise time in which it is collected, interest on sums which are outstanding by way of investment as opposed to short loans or as opposed to moneys presently payable and held over or anything of that kind.

Therefore, I have to consider the position of the appellants. They keep an account at their bank, and it is understood or

contemplated that they will continue to keep an account at the bank, and that the account will always be in credit. On that footing the bank allow them interest calculated upon the fluctuating daily balances to their credit. The question I have to decide is, is that interest yearly interest? Whatever may be the position of the overseers in relation to the question whether they are a corporation or trustees for charitable purposes, I should have thought that they certainly had no power to acquire a capital fund by levying rates, and then investing that fund at interest. That is not what they are to do when levying rates. They are to levy rates as far as they can for their current expenditure. However, they must necessarily keep a small balance in hand, and they get interest upon it under the arrangements which the bank were willing to make. It is no doubt contemplated that the balance will continue for a long time; but what is the daily balance? It is not even a short loan; it is merely money at call, money payable on demand. That is the position in point of law, and it is the position which is recognized by the practice of the parties, because the appellants draw a cheque at any time for a large or small sum and to that extent reduce the balance. They also pay in money without making any new arrangement with regard to that particular money; and it is treated, as in fact it is, as money simply outstanding at call.

I am therefore at a loss to see how, in the light of the authorities, I could have any doubt whatever but that this is not yearly interest. I do not think I need say anything more. Therefore I must dismiss this appeal with costs.

Appeal dismissed.

Solicitors for appellants: *Sharpe, Pritchard & Co., for Cleaver, Holden & Co., Liverpool.*

Solicitor for respondent: *Solicitor of Inland Revenue.*

F. O. R.

1915
June 17, 18.

THE KING *v.* JUSTICES OF THE BEACONTREE DIVISION OF ESSEX.

THE KING *v.* WRIGHT AND OTHERS.

Justices—Jurisdiction—Right to act in any Petty Sessional Division of County —Sale of Milk—Offence—Place of Delivery—Sale of Food and Drugs Act, 1875 (38 & 39 *Vict.* c. 63), *s.* 20.

Sect. 20 of the Sale of Food and Drugs Act, 1875, provides that proceedings for the recovery of a penalty for an offence under the Act may be taken "before any justices in petty sessions assembled having jurisdiction in the place where the article or drug sold was actually delivered to the purchaser, in a summary manner":—

Held, that where the article has been delivered to a purchaser at a place situated in one petty sessional divisional of a county, the proceedings may be taken in another petty sessional division of the county before justices who usually sit and act in and for that other division.

Reg. v. *Beckley* (1887) 20 Q. B. D. 187 and *Caistor Rural District Council* v. *Taylor* (1907) 71 J. P. 310 approved and followed.

THE KING *v.* JUSTICES OF THE BEACONTREE DIVISION OF ESSEX.

RULE NISI directed to justices of the peace in and for the county of Essex acting in and for the petty sessional division of Beacontree in that county to show cause why a writ of prohibition should not be awarded to prohibit them from further proceeding to hear and determine a certain information.

The information charged that one Ernest Middleton, a dairyman, did at Chigwell in Essex unlawfully sell to the prejudice of one Charles Henry Baxfield, the purchaser, a certain article of food, to wit, milk which was adulterated with at least 10 parts per cent. of added water, and was not of the value, substance, and quality demanded by the purchaser. Middleton was summoned to appear before the Court of summary jurisdiction sitting at Stratford in Essex to answer the information.

The Sale of Food and Drugs Act, 1875 (38 & 39 Vict. c. 63), s. 20, provides that "When the analyst having analysed any article shall have given his certificate of the result, from which it may appear that an offence against some one of the provisions of this Act has been committed, the person causing the analysis to be made may take proceedings for the recovery of the penalty

herein imposed for such offence, before any justices in petty sessions assembled having jurisdiction in the place where the article or drug sold was actually delivered to the purchaser, in a summary manner."

The Court of summary jurisdiction sitting at Stratford was the Court for the petty sessional division of Beacontree in the county of Essex, and the summons was issued by a justice of the peace who resided in and acted within and for the Beacontree division. The whole of the parish of Chigwell was situate within the Epping petty sessional division of Essex, and the place where the purchase referred to in the information took place and where the alleged offence, if any, was committed was not within 500 yards of the boundary of the Beacontree division.

On April 10, 1915, the defendant Middleton appeared at the Court of summary jurisdiction at Stratford before the justices sitting for the Beacontree petty sessional division to answer the summons. He was represented by a solicitor who objected that the Court had no jurisdiction to hear the information on the grounds (*a*) that by s. 20 of the Sale of Food and Drugs Act, 1875, proceedings for an offence under that Act can only be taken and dealt with before justices in petty sessions assembled having jurisdiction in the place where the article sold was actually delivered to the purchaser; and (*b*) that a summary offence can only be heard and determined by a Court of summary jurisdiction sitting in and for the petty sessional division of the county within which it is committed or within 500 yards of the boundary thereof.

After this objection to the jurisdiction had been taken, the hearing of the information was adjourned. Subsequently notice was given to the solicitor for the defendant that the justices had restored the information to the list for hearing and proposed to proceed to hear and determine it on April 24, 1915. A rule nisi in the above terms was then moved for on behalf of the defendant, and granted, on the grounds that there was no jurisdiction in the justices in petty sessions assembled for the Beacontree division to hear and determine the summons as they were not the justices having jurisdiction in the district where the delivery

1915

REX v. BEACONTREE JUSTICES.

actually took place, nor was there any jurisdiction for the justice who issued the summons to issue the same for an alleged offence outside the district in which he generally acted as a justice or for the proceedings to be commenced or instituted in the Beacontree division of Essex.

No one appeared to show cause against the rule, but an affidavit had been made by the chairman of the bench of justices for the Beacontree division sitting at the Court House at Stratford on April 10, from which it appeared that in 1881 an arrangement had been made between the justices of the Beacontree division and the justices of the Epping division that all cases (other than those specially excepted by statute) arising in certain districts, including Chigwell, which were all in the county of Essex and outside though adjoining the Beacontree division should be heard at either Epping, Waltham Abbey, or Stratford petty sessions for general convenience on the ground that there was direct railway communication with Stratford and a Court was held there every day, thereby enabling a large number of small charges to be dealt with without remand or delay, whereas the Courts at Waltham Abbey and Epping were only held once a week; and that this arrangement had worked satisfactorily. The affidavit further stated that the justices had been advised that there was no substance in the objection taken to the jurisdiction in this case. The authorities showed that a justice appointed for a county as a matter of custom and convenience being once attached to a particular division of the county did not concern himself with the business outside the limits of that district, but a county justice might sit and adjudicate in any petty sessional division of the county upon any matter, not specially excepted by statute, arising in any part of the county, except in county boroughs or boroughs having separate Courts of quarter sessions. The justices, therefore, were of opinion that they had jurisdiction to hear and determine the summons in this case at a Court of summary jurisdiction within the Beacontree division.

C. E. Jones, for the defendant in support of the rule. Under s. 20 of the Sale of Food and Drugs Act, 1875, the proceedings

in this case had to be taken "before any justices in petty sessions assembled having jurisdiction in the place where the article or drug sold was actually delivered to the purchaser, in a summary manner." The place of delivery in this case was in the Epping petty sessional division, and the proceedings should have been taken in that division. The laying of the information constitutes the taking of the proceedings: *Beardsley* v. *Giddings*. (1) There was no jurisdiction either to issue the summons in the Beacontree division or to try the case in that division. It may be that a justice of the peace appointed for a county has jurisdiction to act in any part of the county; but justices have only jurisdiction in petty sessions in a place, which is the word used in s. 20, when they are assembled in petty sessions in the petty sessional division of the county in which the place is situate. Justices assembled in petty sessions in the petty sessional division of Beacontree had no jurisdiction to adjudicate upon an offence alleged to have been committed in the Epping petty sessional division, except in the case of an indictable offence: *Reg.* v. *Beckley*. (2)

[SCRUTTON J. referred to *Buckler* v. *Wilson*. (3)]

That case turned on s. 154 of the Municipal Corporations Act, 1882, which expressly authorizes county justices to exercise jurisdiction in a borough within the county which has not a separate Court of quarter sessions. The division of counties into what are now called petty sessional divisions is regulated by the Division of Counties Act, 1828 (9 Geo. 4, c. 43). By s. 6 of that Act "all matters and things which by law are now or hereafter may be required to be, or which now are, usually transacted or determined within the division within which the same shall have arisen . . . . before justices" dwelling or usually acting within the same "shall be transacted and determined within the new division" to be created under that Act. No alteration in the divisions of a county can be made except in accordance with the procedure laid down by the Act of 1828. The arrangement of the justices of Essex to try cases arising in certain parts of the Epping Division in the Beacontree Division is wholly invalid. The origin of the restriction of the jurisdiction of justices in

(1) [1904] 1 K. B. 847. (2) 20 Q. B. D. 187.
(3) [1896] 1 Q. B. 83.

1915

REX v. BEACONTREE JUSTICES.

petty sessions to the divisions in which they reside and usually act is obscure, but it is of great antiquity, as in a book published in 1602 containing a collection of the statutes and written by William Rastall, Serjeant-at-Law, there is, at p. 160, a reference to a statute, 33 Hen. 8, c. 10 (repealed by 37 Hen. 8, c. 7), which provided that the justices should divide themselves "limiting and assigning always the number of two of them at the least, or more, into the hundreds, wapentakes, rapes, commotes, or number of towns and villages by their discretions," and that the justices so divided should in each quarter of the year hold "within the limits of their division" one sessions besides the general quarter sessions. The expression "petty sessions" first occurs in the marginal note to s. 6 of the Act of 1828. Sect. 46 of the Summary Jurisdiction Act, 1879, recognizes that the jurisdiction of Courts of summary jurisdiction is confined to cases arising within the petty sessional division in which the Court is situated. The word "place" in s. 20 of the Sale of Food and Drugs Act, 1875, must therefore be construed with reference to a petty sessional division and not to the county as a whole. *Reg.* v. *Brodhurst* (1) also strongly supports this view. That case arose under the Public Health Act, 1848, s. 2 of which defines a justice to be "a justice acting for the place in which the matter requiring the cognisance of the justice arises," and it was held that this in a county means a justice acting within the petty sessional division in which the matter arises; and, therefore, that justices of the county not acting within the petty sessional division in which an offence under the Act had been committed had no jurisdiction to convict.

THE KING *v.* WRIGHT AND OTHERS.

Rule nisi to certain justices of the peace in and for the county of Essex and one Alfred Stone to show cause why the said justices should not proceed to hear and determine the matter of an information preferred by one Arthur Horsnell against Alfred Stone.

Horsnell was an inspector under the Sale of Food and Drugs

(1) (1863) 32 L. J. (M.C.) 168.

1915

REX v. WRIGHT.

Acts. The information preferred by him charged that Stone on March 3, 1915, at the parish of Hornchurch in the county of Essex did unlawfully sell to the prejudice of Messrs. Gosling and Hosegood, the purchasers, a certain article of food, to wit, milk which was adulterated with at least 25 parts per cent. of water and was not of the nature, substance, and quality demanded by the purchasers.

The parish of Hornchurch is in the Romford petty sessional division.

The inspector attended before E. B. L. Williams, Esq., a justice of the peace for the county of Essex, at the Court House for the Orsett petty sessional division, and applied to him to issue a summons against Stone charging him with the offence alleged in the information. Mr. Williams issued the summons and, at the request of the inspector, made it returnable before the justices sitting in and for the Romford petty sessional division. Mr. Williams, although a justice of the peace for the county of Essex, was in the habit of sitting with the justices of the Orsett petty sessional division and not with the justices of the Romford petty sessional division.

On the return day of the summons Stone appeared before the justices sitting at Romford petty sessions for the petty sessional division of Romford.

Counsel for Stone took a preliminary objection that the justices had no jurisdiction to hear the summons. He contended that the effect of s. 20 of the Sale of Food and Drugs Act, 1875, was to confine jurisdiction in proceedings taken under that section from the commencement of the proceedings to justices accustomed to sit in and for the petty sessional division of the county in which the article alleged to have been sold contrary to the provisions of the Act of 1875 had actually been delivered to the purchaser; that in summary proceedings the laying or making of an information or complaint was the commencement of the proceedings; and that inasmuch as in this case the information was laid before a magistrate who was not accustomed to sit and act in and for the Romford petty sessional division, the proceedings had not been taken before justices having jurisdiction in the place where the article sold had been actually delivered to the

1915

REX v. WRIGHT.

purchasers, within the meaning of s. 20 of the Act of 1875. In the course of his argument counsel referred to *Beardsley* v. *Giddings* (1) and *Rex* v. *O'Connor*. (2)

After hearing the solicitor for the inspector, and after consideration, the justices declined to hear the summons on the ground of want of jurisdiction to do so.

A rule nisi in the above terms was subsequently moved for on behalf of the inspector and granted on the grounds (1.) that the justices were wrong in law in refusing to hear and determine the summons issued on the information; (2.) that the summons was properly and legally issued by Mr. Williams; and (3.) that he had jurisdiction to issue the summons.

No one appeared to show cause against the rule, but an affidavit had been made by two of the justices constituting the Court on the occasion in question in which the facts were stated as above set out; and the justices further stated that if in the opinion of the Court they had been mistaken in law and the rule nisi ought to be made absolute they were ready and willing to hear the summons.

Rowand Harker, for the prosecutor in support of the rule. The question in this case is whether a justice acting in and for the Orsett petty sessional division had jurisdiction to issue a summons returnable in the Romford division in respect of an offence under the Sale of Food and Drugs Act, 1875, alleged to have been committed in the Romford division. It is to be observed that by s. 19 of the Sale of Food and Drugs Act, 1899, a prosecution under these Acts shall not be instituted after the expiration of twenty-eight days from the time of purchase, and if the summons must be issued by a justice acting in the division in which the delivery took place and petty sessions are only held once a month in that division, as is sometimes the case, it might be impossible to apply for a summons within the prescribed time. The words "having jurisdiction" in s. 20 of the Act of 1875 refer to "any justices." In 1875 one justice sitting alone could act in many matters, and, therefore, the words "in petty sessions assembled" were introduced into s. 20 in order to ensure that

(1) [1904] 1 K. B. 847. (2) [1913] 1 K. B. 557.

the proceedings should be in a petty sessional Court before at least two justices. But there is nothing in s. 20 to say that the proceedings must be taken in the petty sessional division in which the article was delivered; nor does the Act of 1828 in any way support the contention that an offence can only be tried at petty sessions in the division in which it was committed. Justices are appointed to act in and for the whole county and their jurisdiction is in no way limited to a particular division of the county, except by the express terms of some Act of Parliament, as, for example, the Bastardy Laws Amendment Act, 1872, s. 3 of which provides that application for a summons should be made to a justice of the peace acting for the petty sessional division of the county in which the woman resides, and in licensing matters the jurisdiction of the justices is confined to the petty sessional division in and for which they act: see Licensing (Consolidation) Act, 1910, s. 2.

[SCRUTTON J. referred to Archbold's Quarter Sessions, 6th ed., p. 14, citing *Rex* v. *Sainsbury*. (1)]

Sect. 46 of the Summary Jurisdiction Act, 1879, does not throw any light on this question, for a Court of summary jurisdiction is not the same thing as a petty sessional division: see the Interpretation Act, 1889, s. 13, sub-s. 11.

[SCRUTTON J. Sect. 1 of the Summary Jurisdiction Act, 1848, contains no reference to petty sessional divisions.]

It is clear that there is no local restriction on the jurisdiction conferred by s. 29 of that Act. The decision in *Reg.* v. *Beckley* (2) that justices can act in any division of the county was followed and approved in *Caistor Rural District Council* v. *Taylor*. (3) Justices originally had jurisdiction only in quarter sessions. Then they were given authority to act out of sessions, and the practice grew up of justices meeting in special sessions to consider matters which they were entitled to deal with out of sessions: Bacon's Abridgement, tit. Justices of the Peace, vol. 4, p. 605; Dalton's Countrey Justice (1655), p. 9.

[RIDLEY J. referred to "Eirenarcha, or Of the Office of the Justices of Peace," by William Lambard, of Lincoln's Inn,

(1) (1791) 4 T. R. 451.

(2) 20 Q. B. D. 187.

(3) 71 J. P. 310.

1915

REX v. WRIGHT.

published in 1619, and to Stephen's History of the Criminal Law, vol. 1, at p. 124.]

In the Division of Counties Act, 1828, the expression used is, not petty, but special sessions. In the 1831 edition of Burn's Justice the expression "petty sessions" is used for the first time.

LORD READING C.J. In the first of these two cases a rule nisi has been granted to prohibit the justices acting in and for the petty sessional division of Beacontree in the county of Essex from proceeding to hear and determine a summons issued against the applicant for the rule nisi in respect of an offence alleged to have been committed by him under the Sale of Food and Drugs Acts. Sect. 20 of the Act of 1875 provides that proceedings for the recovery of a penalty for an offence under the Act may be taken "before any justices in petty sessions assembled having jurisdiction in the place where the article or drug sold was actually delivered to the purchaser, in a summary manner." The milk in question in this case was delivered to the purchaser at Chigwell, which is in the Epping petty sessional division, and the rule was applied for on the ground that the proper justices to adjudicate upon the summons were the justices of the Epping division, not the justices of the Beacontree division, and that even if the justices of the Beacontree division could deal with the matter they could only do so when assembled in petty sessions in the Epping division. An affidavit has been made by the chairman of the justices of the Beacontree division in answer to the rule nisi from which it appears that in 1881 the justices of that division and of the Epping division arranged between themselves that certain cases arising in certain places in the Epping division should as a matter of convenience be heard in the Beacontree division, and it was in consequence of that arrangement that this case came on for hearing in that division.

It is quite clear that justices appointed for a county, although they may usually sit and act in one particular petty sessional division of the county, may sit in any part of the county, unless there are express words in a statute which prohibit their doing so, and counsel for the applicant has not really pressed the opposite view. The law on this point was, in our opinion,

correctly laid down by Lord Coleridge C.J. in *Reg.* v. *Beckley* (1), where he said: "It is contended that the offence cannot legally be dealt with by magistrates acting in a different petty sessional division from that in which the offence was committed, but there is no such rule of law; for in dealing with an offence committed in the county the magistrates for the county have jurisdiction throughout the county, and there is nothing in the Vexatious Indictments Act to limit their power to hear and determine the case."

The matter was also considered by Lord Alverstone C.J., sitting with Darling and Phillimore JJ., in *Caistor Rural District Council* v. *Taylor*. (2) In that case Lord Alverstone C.J. said: "Sect. 6 of the Division of Counties Act, 1828, which has been referred to, is a section which enables new divisions to be made and which directs business to be done in them; but that does not oust the jurisdiction of the justices in another petty sessional division if they are lawfully entitled to hear the case and it is properly brought before them. They are justices for the county, and *Reg.* v. *Beckley* (1) decided that an offence committed in one petty sessional division may be dealt with by the justices of any other petty sessional division of the same county." That passage states very clearly the proposition of law applicable to this case. My brother Scrutton, in the course of the argument, called attention to a passage in Archbold's Quarter Sessions, 6th ed., p. 14, citing *Rex* v. *Sainsbury* (3), where Lord Kenyon said: "That the King may grant a commission of the peace for a county, and that the jurisdiction of such justices may pervade the whole county, cannot be doubted. Neither can it be disputed that he may grant commissions of the peace for any particular district in the county, and that that sub-division may have justices of its own, exclusive of the jurisdiction of the justices of the county at large; but the latter can only be effected by a non-intromittent clause, prohibiting the county justices from interfering in that district"; and the same learned judge said in another case (4): "The exclusion of county justices from acting in particular districts has always

(1) 20 Q. B. D. at p. 190.
(2) 71 J. P. 310.
(3) 4 T. R. 451, at p. 456.
(4) *Blankley* v. *Winstanley* (1789) 3 T. R. 279, at p. 287.

1915

REX v. BEACONTREE JUSTICES. REX v. WRIGHT.

Lord Reading C.J.

been watched with a jealous eye; and nothing but express words are sufficient to exclude them." We have had a very interesting discussion as to the origin of petty sessions and as to the earliest introduction of the terms petty sessions and petty sessional division, but it is unnecessary for the purposes of this case to give any decision on those matters; it is sufficient to affirm the important principles of law which were laid down in the two cases to which I have referred, supplemented by the quotations from the judgments of Lord Kenyon.

Those authorities state the general law, namely, that there can be no limitation upon the right of the justices of a county to sit in every petty sessional district of the county, unless a limitation can be found in the commission under which a justice of the peace is appointed to that office, or in the express words of the statute creating the particular offence. No question arises in this case as to there being any limitation in the commissions of these justices, but it is said that the effect of the language of s. 20 of the Sale of Food and Drugs Act, 1875, is to impose a limitation upon the justices of the county, and that it is only the justices sitting in the petty sessional division for the place where the milk was actually delivered who are entitled to adjudicate upon the case. In my opinion s. 20 does not have the effect of imposing that limitation. I read the words "any justices in petty sessions assembled having jurisdiction in the place where the article or drug sold was actually delivered" as meaning that any question with regard to the jurisdiction of the justices is to be determined by the place of delivery, and that no other question is to be brought into consideration. The place of delivery determines jurisdiction, which means, in my opinion, that the place of delivery will determine the county, the justices of which will have jurisdiction to deal with the case. In the case of a transaction for the sale and delivery of milk, the sale might possibly take place in one county and the delivery in another, and difficult questions might arise as to where the case should be dealt with. That difficulty is got rid of by s. 20. When once the place of actual delivery has been ascertained, the justices of the county in which that place is situated are the only justices who have jurisdiction to

adjudicate upon the case. The reason why the words "justices in petty sessions assembled" were introduced into the section was to make it clear that the justices when dealing with cases under this Act were to be sitting in a Court, and not elsewhere, and acting as a Court of summary jurisdiction. The result is that any justices of the county may sit, and they may sit in any petty sessional division, provided that the milk or other article was actually delivered at a place in that county.

It is no doubt better as a general rule for cases to be dealt with in the petty sessional division for the place where the delivery took place, and by the justices who usually sit in that division, but that is a matter of convenience only. As a matter of law and jurisdiction there is nothing to prevent any justices for the county from sitting and acting in another division of the county.

For these reasons the rule nisi in the first case must be discharged.

In the other case, *The King* v. *Wright*, the point raised is somewhat different, though the proceedings were taken under the same Act. The summons was granted by a magistrate who did not usually sit in or act for the petty sessional division in which the milk was delivered, but the summons was returnable in the division in which the place of delivery was, and it came on for hearing before the justices of that division. These justices upheld an objection to their jurisdiction to adjudicate upon the summons on the ground that the justice who had issued the summons had no jurisdiction to do so, he not being a justice acting in the division in which the delivery took place. In our view the justices were wrong in refusing to hear and determine the matter. For the reasons which I have already given in the previous case a justice acting in any petty sessional division of the county could deal with the matter, either by issuing a summons or by adjudicating upon it. The rule nisi in the second case must, therefore, be made absolute.

RIDLEY J. I agree with the judgment of the Lord Chief Justice. I have never had any doubt that a justice of the peace for a particular county can act in all the petty sessional divisions

1915

REX v. BEACONTREE JUSTICES. REX v. WRIGHT.

Ridley J.

of that county, though as a matter of practice a justice does not as a rule act in more than one division. But I certainly had an impression that a person charged with an offence which could be tried at petty sessions had a right to be tried in the petty sessional division in which the offence was committed. The practice has been so universal that it might easily be supposed that it was done as a matter of right, but I have come to the conclusion that my impression was erroneous and that a defendant cannot claim as of right to be tried in the petty sessional division where the offence was committed, unless the right is to be found in the statute creating the offence. In the present case s. 20 of the Sale of Food and Drugs Act, 1875, is relied on as giving the right, but I think on the true construction of the section it has not that effect. It is difficult to trace the origin of the expression "petty sessions." Sessions are described at considerable length in the old books which have been referred to in the course of the arguments. Sessions were sometimes called general and were sometimes held sixteen times a year for the convenience of the inhabitants of the county, but they were more usually held quarterly or four times a year, and thus they came to be called quarter sessions. The phrase "petty sessions" had no particular significance with regard to district; it was merely a small or minor session as compared with the general sessions. As time went on it gradually came to have the significance which we now attach to it. The expression petty sessions is used for the first time, I think, in a statute in the marginal note to s. 6 of the Division of Counties Act, 1828, the Act which created what have since come to be known as petty sessional divisions; it is also to be found in an Act passed in 1847 for the more speedy trial of juvenile offenders, 10 & 11 Vict. c. 82, s. 1 of which speaks of "two or more justices of the peace . . . . in petty sessions assembled." Sir James Stephen in his History of the Criminal Law, vol. 1, at p. 124, says that "the expression 'petty sessions' must at that time have been rather popular than legal, as the preamble of 12 & 13 Vict. c. 18 recites that 'certain meetings of justices of the peace called petty sessions of the peace are holden in and for certain divisions of the several counties of England and Wales called petty sessional

divisions, and important duties have lately been assigned to the justices attending at such petty sessions.'" Sect. 1 of that Act goes on to enact that "every sitting and acting of justices of the peace . . . . shall be deemed a petty sessions of the peace." Since that time the words have acquired a definite meaning, and at the present day it is well understood what is meant by petty sessions and petty sessional division, and, as I have already said, there is no doubt that all the justices of a county have the right to sit in petty sessions in any petty sessional division of the county. But the question which troubled me was whether an offender had not a right to be tried in the petty sessional division in which the offence was committed. It must, however, be borne in mind that the whole of the law relating to summary conviction is solely the creation of statute. It is stated in the books, and I believe correctly, that at common law there was no such thing as summary conviction. That being so, if an offender can claim a local venue entitling him to be tried in the division where he is charged with having committed the offence it must be found in some statute. The common law of this country does not give him that right. Crime is certainly local, but the locality is limited to the county. There is no general law extending the local venue to petty sessional divisions. I feel, therefore, that I was mistaken in thinking that what is really done as a matter of custom only was a matter of right.

For these reasons I agree with the Lord Chief Justice.

SCRUTTON J. I agree with the judgment of the Lord Chief Justice.

Rule nisi in the first case discharged, in the second case made absolute.

Solicitors: *C. C. Sharman; Sharpe, Pritchard & Co., for Goold, Chelmsford.*

F. O. R.

C. A.
1915
July 1, 16.

[IN THE COURT OF APPEAL.]

THE KING *v.* RICHARDS.
THE KING *v.* WILLIAMS.

Parliament—Election—Returning Officer—Municipal Borough a County of itself—Parliamentary Borough with Two Mayors—Municipal Corporations Act, 1882 (45 & 46 *Vict. c.* 50), *s.* 244, *sub-ss.* 1, 2—*Redistribution of Seats Act*, 1885 (48 & 49 *Vict. c.* 23), *s.* 12, *sub-s.* 4.

By a charter of 1764 the borough of C. was created a county of itself. It had from early times been a parliamentary borough, and down to 1832 had by itself returned a member to Parliament. By the Representation of the People Act, 1832, the borough of L. was appointed to share with the borough of C. in the election of a member of Parliament for C. The writ for the election of such member continued as theretofore to be directed to the sheriff of the county of the town of C. In 1913 L. was incorporated as a municipal borough.

The Municipal Corporations Act, 1882, provides by s. 244, sub-s. 1, that "In boroughs, other than cities and towns being counties of themselves, the mayor shall be the returning officer at parliamentary elections"; and by sub-s. 2, "If there are more mayors than one within the boundaries of a parliamentary borough the mayor of that borough to which the writ of election is directed shall be the returning officer."

The Redistribution of Seats Act, 1885, s. 12, sub-s. 4, after reciting sub-s. 2 of s. 244 of the Act of 1882, enacted that: "In any such case the writ of election shall be directed to the mayor of that one of the municipal boroughs to the mayor of which the writ has before the passing of this Act been directed, or if it has not been directed to any such mayor, then to the mayor of that one of the municipal boroughs which has the largest population according to the last census for the time being, and in any such case the town clerk of the municipal borough, the mayor of which is the returning officer, shall be the town clerk who under the Registration Acts is to receive the revised lists of parliamentary voters from the revising barrister."

According to the last census taken in 1911 the borough of L. had a larger population than that of C. Upon the question who was entitled to receive from the revising barrister for the borough of C. the revised lists of parliamentary voters:—

Held, that there was nothing in the above-mentioned sections to take away from the sheriff of C. his common law right to act as returning officer, and that the town clerk of C. was entitled to receive the revised lists of voters.

Decision of the Divisional Court [1915] 1 K. B. 299 affirmed.

Appeal from the decision of a Divisional Court (Darling, Lawrence, and Sankey JJ.). (1)

(1) [1915] 1 K. B. 299.

C. A. 1915

REX v. RICHARDS. REX v. WILLIAMS.

The Divisional Court had discharged two rules directed to the revising barristers of Llanelly and Carmarthen respectively to hand the lists of voters in the boroughs of Llanelly and Carmarthen to the town clerk of Llanelly.

The borough of Carmarthen is an ancient municipal borough. By a charter of James I. it was created a county of itself, and by a later charter of 1764 in the reign of George III. that grant of the status of a county of itself was confirmed to it. By the said charters the borough was authorized to elect annually two sheriffs. By s. 61 of the Municipal Corporations Act, 1835 (5 & 6 Will. 4, c. 76), the council of the county of the town of Carmarthen were to appoint annually one sheriff who was to perform all the duties theretofore performed by the two. Carmarthen had also from very early times been a parliamentary borough, and down to 1832 had by itself returned a member to Parliament. By the Representation of the People Act, 1832 (2 Will. 4, c. 45), s. 8 and Sched. E, it was provided that Llanelly should "have a share in the election of a member to serve in all future Parliaments for the shire town or borough" of Carmarthen. Since that date the writ for the election of such member continued as theretofore to be directed to the sheriff of the county of the town of Carmarthen.

On August 14, 1913, Llanelly was incorporated as a municipal borough, since which date there have been two mayors within the boundaries of the parliamentary borough of Carmarthen. According to the last census, which was taken in 1911, the population of the borough of Carmarthen was 11,944 persons, and that of Llanelly was 32,701.

On September 15, 1914, L. M. Richards, the revising barrister for the borough of Llanelly, revised the lists of parliamentary voters for the said borough, and on September 16 St. J. F. Williams, the revising barrister for the borough of Carmarthen, revised the lists for that borough. The town clerk of Llanelly applied to the said revising barristers to hand to him the revised lists of voters for the said boroughs, claiming that he was entitled to receive them, upon the ground that, the population of Llanelly being larger than that of Carmarthen, the mayor of Llanelly was under the provisions of s. 12, sub-s. 4, of the Redistribution of

C. A. 1915

REX v. RICHARDS.

REX v. WILLIAMS.

Seats Act, 1885, the person to whom the writ of election was to be directed. The revising barristers having refused to hand to him the said lists of voters, the above-mentioned rules were obtained, and subsequently discharged by the Divisional Court.

The town clerk of Llanelly appealed.

Foote, K.C., and *R. M. Montgomery, K.C.*, for the appellant.

Macmorran, K.C., and *G. W. Bailey*, for the respondent the town clerk of Carmarthen.

E. G. Palmer, for the sheriff of Carmarthen.

The question raised by the appeal turned mainly upon the construction of certain sections of the Municipal Corporations Act, 1882, and the Redistribution of Seats Act, 1885. (1)

The arguments used before the Divisional Court were substantially repeated in the Court of Appeal and sufficiently appear from the judgments. *Rex* v. *Macaskie* (2) was referred to.

July 16. LORD COZENS-HARDY M.R. The question in these appeals is whether the revising barrister of the borough of Carmarthen should be directed to hand the list of parliamentary voters to the town clerk of Llanelly.

(1) By the Municipal Corporations Act, 1882, s. 244, sub-s. 1, "In boroughs, other than cities and towns being counties of themselves, the mayor shall be the returning officer at parliamentary elections."

Sub-s. 2: "If there are more mayors than one within the boundaries of a parliamentary borough, the mayor of that borough to which the writ of election is directed shall be the returning officer."

By the Redistribution of Seats Act, 1885, s. 12, sub-s. 4, "Whereas by the Municipal Corporations Act, 1882, it is enacted that if there are more mayors than one within the boundaries of a parliamentary borough, the mayor of that municipal borough to which the writ of election is directed shall be the returning officer; Be it therefore enacted that, In any such case the writ of election shall be directed to the mayor of that one of the municipal boroughs to the mayor of which the writ has before the passing of this Act been directed, or if it has not been directed to any such mayor, then to the mayor of that one of the municipal boroughs which has the largest population according to the last census for the time being, and in any such case the town clerk of the municipal borough the mayor of which is the returning officer shall be the town clerk who under the Registration Acts is to receive the revised lists of parliamentary voters from the revising barrister."

(2) [1914] 3 K. B. 62.

The Divisional Court answered the question in the negative. Carmarthen is an ancient borough and is a county of itself. At common law the sheriff of a county is the person to whom all writs for elections within his bailiwick ought to be addressed, whether they be for election of knights of the shire or of members for boroughs. But where a borough is a county of itself the sheriff of that borough, as distinct from the sheriff of the county at large, is the only person to whom the writ could be directed.

Under the Reform Act of 1832, ss. 8 and 9, provision was made for Llanelly "sharing with" the borough of Carmarthen in the election of a member for the borough of Carmarthen. The effect of this was, I think, to leave the position of the sheriff of Carmarthen untouched. He was the returning officer for the old municipality as well as for Llanelly, which, for voting purposes, shared with Carmarthen. The mayor of Carmarthen never had any right to interfere with the sheriff of Carmarthen as returning officer. By s. 244 of the Municipal Corporations Act, 1882, provision is made that the mayor shall be the returning officer in boroughs "other than cities and towns being counties of themselves." This left the position of the sheriff of Carmarthen untouched. Sub-s. 2 of that section seems to me in like manner to exclude boroughs which are counties of themselves. It contemplates only a case where there are more mayors than one within the boundaries of such a borough as is contemplated by sub-s. 1, and this again excludes Carmarthen. By s. 12, sub-s. 4, of the Redistribution of Seats Act, 1885, there is a re-enactment, or what I regard as a re-enactment, of the older provisions. It seems to me that there is nothing in that section to deprive the sheriff of his position as returning officer, or to confer any right upon the mayor of Carmarthen as distinct from the sheriff. It is, however, contended that when in 1913 a charter was granted incorporating Llanelly as a municipal corporation, the effect was that the sheriff ceased to be the returning officer, and that if Carmarthen has the larger population the mayor will take the place of the sheriff, and that if Llanelly has the larger population, as the fact is, the mayor of Llanelly will take the place of the sheriff. In my opinion this contention cannot prevail. I do not think there is anything in

C. A. 1915

REX v. RICHARDS. REX v. WILLIAMS.

the sections to which I have referred which interferes with the position of the sheriff of a borough which is a county of itself. It is not a question which of two mayors should have the right of acting as returning officer. It is a question whether the undoubted common law right of the sheriff of Carmarthen is taken away. For these reasons I think the appeal fails and must be dismissed.

PICKFORD L.J. I agree and do not think it necessary to add anything to what the Master of the Rolls has said in his judgment.

WARRINGTON L.J. Under the Reform Act, 1832, the recently incorporated borough of Llanelly has a share in the election of a member of Parliament for the borough of Carmarthen.

The substantial question before the Court is whether the mayor of Llanelly is now the proper returning officer for the borough of Carmarthen in place of the sheriff who has hitherto performed that duty. The Divisional Court has held that the sheriff is still the proper returning officer. The representatives of Llanelly appeal.

The borough of Carmarthen is an ancient borough and by a charter of James I. it was made a county of itself by the name of the county of the borough of Carmarthen. It possessed originally two sheriffs—it was deprived of one by Act of Parliament, but it still possesses one.

I think it is clear that by ancient usage the writ directing the return of members to serve in Parliament was addressed to the sheriff of a county and directed him to cause to be elected not only the knights of the shire but also the representatives of the cities and boroughs within his bailiwick, and it was he who made the return to the writ. A borough, however, which was a county of itself was not subject to the authority of the sheriff of the county at large, and accordingly the writ was addressed to the sheriff of the county of the borough, and he became the returning officer. The sheriff of Carmarthen has hitherto been regarded without question as the proper returning officer for the parliamentary borough of Carmarthen, but it is contended by the

appellants that since the incorporation of Llanelly the mayor of that borough, having a larger population than Carmarthen, is by virtue of recent legislation, and particularly of s. 12 of the Redistribution of Seats Act, 1885, entitled to receive the writ of election and to act as returning officer.

The legislation material to the question begins with the Reform Act, 1832. Welsh boroughs were dealt with in a special manner. It was enacted by s. 8 that each of the places named in the first column of Sched. E should have a share in the election of a member to serve in all future Parliaments for the shire town or borough which is mentioned in conjunction therewith in the second column of the same schedule; and by s. 9 it was provided that each of the places in the first column and each of the shire towns or boroughs in the second column should include the places comprehended within their respective boundaries as settled by an Act therein referred to as about to be passed and being in fact the statute 2 & 3 Will. 4, c. 64. Llanelly is one of the places in the first column and is thereby stated to be sharing with the shire town or principal borough of Carmarthen. Provision is made by the Act for the appointment of returning officers for certain new boroughs, but no such provision is made in the case of the Welsh boroughs; on the contrary it appears clearly from s. 74 that the returning officer for the shire town or borough (who in the case of Carmarthen was the sheriff) was to be the returning officer for the entire constituency.

So far, therefore, nothing has been done by Parliament which affects the position of the sheriff of the county of the borough of Carmarthen. Nothing in my opinion turns upon the Boundary Act 2 & 3 Will. 4, c. 64.

By the Municipal Corporations Act, 1835, it is enacted by s. 57 that in boroughs which return a member or members to serve in Parliament other than cities and towns which are counties of themselves the mayor shall be the returning officer at all such elections with a proviso that in every case where there shall be more than one mayor within the boundaries of any borough as the same were then or should at any future time be settled in so far as respects the election of members to serve in Parliament the

C. A. 1915

REX v. RICHARDS. REX v. WILLIAMS.

Warrington L.J.

mayor of that borough to which the writ of election shall be directed shall be the returning officer. This provision is important because it is the starting point of the series of enactments culminating in s. 12 of the Redistribution of Seats Act, 1885, already referred to. It is clear that this section at all events did not apply to Carmarthen because Carmarthen was a county of itself and therefore expressly excepted from the main provision, and being so excepted it must also be treated as excepted from the proviso. Moreover, having regard to the terms of the Act of 1832 the district of Llanelly was not in my opinion within the boundaries of the borough as settled for the purposes of parliamentary elections; the district shared in the election of the borough but its boundaries were not settled as those of the borough.

The Municipal Corporations Act, 1835, was repealed by the Municipal Corporations Act, 1882. Sect. 244 of the last mentioned Act contained provisions substantially repeating those of s. 57 of the Act of 1835 as to returning officers. It is in the following terms: [The Lord Justice read the section and continued.]

There is a definition clause in this Act in which "borough" is defined as a city or town to which the Act applies and "parliamentary borough" is defined as meaning "any borough, city, county of a city, county of a town, place or combination of places, returning a member to serve in Parliament, and not being a county at large, or a riding, parts, or division of a county at large."

I have mentioned the definition clause because some stress was laid upon it in argument, though I confess I do not myself see that it throws much light on the meaning of the section.

The first sub-section, as did the corresponding section of the Act of 1835, excludes towns which are counties of themselves; the second sub-section is in my opinion in substance a proviso on the first, and is intended to settle a question which might arise as to which mayor of several is to be returning officer, but has no application to a case where as in that of Carmarthen no such question can arise, inasmuch as that town is a county of itself and has by common law a returning officer other than the mayor.

The same conclusion seems to me to be reached by a strict application of the interpretation clause. Sub-s. 1 would then read "in cities or towns to which this Act applies other than cities and towns being counties of themselves the mayor shall be the returning officer at parliamentary elections," and the meaning of sub-s. 2 would be, if the parliamentary borough is a combination of more than one such city or town, then the mayor of one of those cities and towns to be selected as pointed out in the section should be the returning officer. The exception of towns which are counties of themselves still in my opinion governs both sub-sections.

But a further enactment on the subject is contained in s. 12 of the Redistribution of Seats Act, 1885. The first three sub-sections provide for the appointment of returning officers for boroughs constituted under the Act in which there is no mayor. The fourth sub-section is in the following terms: [The Lord Justice read the sub-section and continued.]

The appellants say that there are now more mayors than one within the parliamentary borough of Carmarthen and that the writ has not hitherto been directed to any such mayor, and they contend that therefore the writ ought now to be directed to the mayor of Llanelly, the more populous town, with the consequence that by virtue of the Municipal Corporations Act, 1882, he will become the returning officer.

The answer to this contention is in my opinion that the provision as to the direction of the writ is merely supplementary to the provision in sub-s. 2 of s. 244 of the Municipal Corporations Act, 1882, and that if that sub-section does not apply to Carmarthen, as I hold it does not, then neither does the supplementary provision apply.

It was said that unless the appellants' contention is correct no meaning is given to the words "if it has not been directed to any such mayor." But this is not so. One of the new boroughs was Hanley. This comprised the two municipal boroughs of Hanley and Burslem; neither of these had previously been a parliamentary borough, and the writ had therefore not been directed to the mayor of either town.

It may well be contended that this sub-s. 4 only applies to

C. A. 1915

REX v. RICHARDS. REX v. WILLIAMS.

boroughs constituted under the Act, but it is unnecessary to decide this question. It does not apply, in my opinion, to Carmarthen. The appeal fails and must be dismissed.

Appeal dismissed.

Solicitors: *Rhys Roberts & Co., for W. Spowart, Llanelly; Baker & Sons.*

G. A. S.

1915 *July* 5.

BECKER, GRAY & CO. *v.* LONDON ASSURANCE CORPORATION.

Insurance (Marine)—Peril of Capture—Ship putting into Neutral Port to avoid Capture—Loss of Venture—Whether Loss proximately caused by Peril insured against.

The plaintiffs shipped goods on board a German ship for carriage from Calcutta to Hamburg, and insured them on that voyage with the defendants against the usual perils, including men-of-war, enemies, and restraint of princes. While the goods were at sea war broke out between Great Britain and Germany, and the master on being informed of that fact put into a neutral port in order to avoid the risk of capture by hostile cruisers, and with the intention of suspending the further prosecution of the voyage until after the termination of the war. The commercial venture insured being thereby destroyed, the plaintiffs gave notice of abandonment to the defendants and claimed as for a total loss. At the time that the ship put into the neutral port she had not been chased by any hostile cruiser, nor had she even sighted one, but if she had continued her voyage the peril of capture would have been great:—

Held that, although to constitute a loss by capture actual capture was not necessary, the risk of such capture must have been imminent, and that the termination of the voyage by putting into a neutral port to avoid the risk of capture before the ship had gone into the zone of immediate danger, and before consequently the risk had begun to operate, was a loss which could not be regarded as proximately caused by the peril insured against, and that the plaintiffs could not recover.

TRIAL of action before Bailhache J. without a jury.

The plaintiffs, a firm of British merchants, in June, 1914, sold in Calcutta to German buyers 500 bales of jute for shipment to Hamburg, the sale being upon the terms that the property was

not to pass until arrival of the goods and payment of the price. In pursuance of that contract they shipped 218 bales on board the German steamship *Kattenturm* for carriage from Calcutta to Hamburg, and by a policy of marine insurance, dated June 28, 1914, they insured the goods with the defendants upon the said voyage against the perils (amongst others) of "men-of-war . . . . enemies . . . . takings at sea, arrests, restraints, and detainments of all kings, princes, and people of what nation, condition, or quality soever." On August 4, 1914, while the goods were at sea war broke out between Great Britain and Germany. On August 6 the *Kattenturm* was in the neighbourhood of Messina, which was at that date a neutral port, and the master, who had notice of the existence of the state of war, put into that port in order to avoid the risk of capture by one of the British or French cruisers then in the Mediterranean, and with the intention of suspending the further prosecution of the voyage until after the termination of the war. At the time when the ship so put into Messina she had not been chased by a hostile cruiser, nor had she even sighted one, but, as appeared from a letter from the British Admiralty written after action brought, "any German steamer proceeding on or after the 5th August last through the Mediterranean on a voyage to Hamburg would, in their Lordships' opinion, have been in peril of capture by British or allied warships when outside neutral territorial waters." On September 1, as there was no prospect of the voyage being resumed and the goods reaching their destination within a reasonable time, the plaintiffs gave the defendants notice of abandonment and claimed that the goods were a constructive total loss. On September 4 the *Kattenturm* removed from Messina to Syracuse, and she was still in that latter port at the time of the trial of the action. The plaintiffs endeavoured to get possession of the jute, but the captain of the ship refused to deliver it up. In November the German Government issued a prohibition against the delivery to their owners of any goods belonging to British subjects on board German ships. In consequence of that prohibition the plaintiffs gave to the defendants a fresh notice of abandonment on December 16. The defendants having refused to accept the abandonment, the writ was issued on December 17.

1915

BECKER, GRAY & CO. v. LONDON ASSURANCE CORPORATION.

Butler Aspinall, K.C., Leck, K.C., and *R. A. Wright,* for the plaintiffs. This was a policy on the venture of the carriage of goods to Hamburg. As the war was likely to continue for an indefinite time, and it was improbable that the ship would be able to leave the refuge of neutral waters and carry the goods to their destination until after the termination of the war, the venture was destroyed when the ship put into Messina, and the goods were constructively lost. Secondly, they were lost by the perils insured against. Those perils included "men-of-war," and here it was solely owing to the presence of hostile men-of-war in the Mediterranean that the ship was unable to continue her voyage. The plaintiffs were therefore right in giving notice of abandonment. In Phillips on Insurance, 3rd ed., s. 1115, at p. 657, in a section dealing with the risk of capture and restraints, it is said: "Where, after the risk has begun, the voyage is inevitably defeated . . . . by a hostile fleet being in the way rendering the proceeding upon it utterly impracticable . . . . an assured on the cargo has the right to abandon." If the law is there correctly stated it covers the present case. The loss was also caused by "enemies." The captain of the *Kattenturm,* which was an enemy ship, refused to give the plaintiffs possession of the jute. Such refusal was justifiable even before November, for the owner of a part of a cargo cannot demand delivery at an intermediate port which the ship happens to put into, and after the issue of the prohibition of the German Government in November it became illegal for the captain to give delivery to the plaintiffs. The loss was also caused by a "restraint of princes." In *Rodocanachi* v. *Elliott* (1), where goods in the course of their transit were detained in Paris by reason of the city being besieged by the German forces, it was held that they were lost by a restraint of princes. But if an army on land barring the road to the port of destination can be said to cause the loss of the goods, equally a fleet at sea barring the passage of the goods must be the cause of their loss. Moreover there was a loss by restraint of princes immediately upon the declaration of war, for it thereupon became illegal for the plaintiffs to deliver the jute to the German buyers. In that

(1) (1874) L. R. 9 C. P. 518.

respect the case is covered by *Sanday & Co.* v. *British and Foreign Marine Insurance Co.* (1) and *Karberg & Co.* v. *Blythe & Co.* (2)

Leslie Scott, K.C., Roche, K.C., and *Theobald Mathew*, for the defendants. *Sanday's Case* (1) is distinguishable, for there the ship was a British ship, whereas here the goods were on board a German ship, the master of which was perfectly entitled to continue the voyage to Hamburg, and the plaintiffs could not have interfered with his doing so. When the ship went into Messina the voyage was voluntarily abandoned to avoid capture. An intention on the part of the master to stay there for an indefinite time was sufficient to bring it to an end. But it was by the act of the master that the venture was lost, not by a peril insured against: *Hadkinson* v. *Robinson* (3); *Kacianoff* v. *China Traders Insurance Co.* (4) A loss by fear of capture is not the same thing as a loss by capture, and the ordinary form of policy does not contain apt words to cover a loss by the former cause: *Nickels* v. *London and Provincial Marine and General Insurance Co.* (5) The passage cited from Phillips on Insurance is contained in a section in which the author was seeking to show that *Hadkinson* v. *Robinson* (3) was wrongly decided. But the principle of that decision must now be regarded as firmly established.

Butler Aspinall, K.C., in reply. The act of the captain in seeking refuge in Messina cannot be said to have been voluntary, for the danger was imminent. In *Hadkinson* v. *Robinson* (3) the ship was not within the zone of danger at the time when the voyage was abandoned. The same observation applies to *Kacianoff's Case* (4), where the ship was lying safely in port at the time of the abandonment, and thereby prevented the peril from operating. Lord Reading in that case pointed out that "It would have been a totally different state of things if the vessel had left and then, outside, had been met and threatened by a Japanese vessel, or if, approaching Nagasaki, she had been in some such danger." That is exactly the present case.

(1) [1915] 2 K. B. 781.
(2) [1915] 2 K. B. 379.
(3) (1803) 3 Bos. & P. 388.
(4) [1914] 3 K. B. 1121.
(5) (1900) 6 Com. Cas. 15.

1915

BECKER, GRAY & CO. v. LONDON ASSURANCE CORPORATION.

BAILHACHE J. This is an action against underwriters on goods under a policy dated June 28, 1914, on a voyage from Calcutta to Hamburg in a German steamer, the *Kattenturm*. The portion of the cargo with which we are concerned was sold by the plaintiffs on June 11, 1914, to a German firm, but it is conceded that on the material dates the property in the goods remained in the sellers. The *Kattenturm* left Calcutta early in July, and while she was on her voyage war broke out between this country and Germany on August 4. The master having become aware of that fact on August 6 put into Messina. He afterwards shifted the ship on September 4 to Syracuse, where she still remains, but that shifting from Messina to Syracuse is of no importance so far as the point which I have to decide is concerned. On September 1 while the ship was at Messina the plaintiffs gave notice of abandonment, and on December 16 when she was at Syracuse they gave a second notice. The underwriters declined to accept either notice of abandonment, but in both cases stated that they would treat the matter as though a writ had been issued. I have to consider what the state of affairs between the parties was at the beginning of September. The master in putting into Messina did the most prudent thing that he could do. His ship was a German ship; the French and English fleets were watching the seas; and he rightly felt that if he proceeded on his voyage the ship would be in grievous danger of capture. A letter from the Admiralty has been put in, and is to be treated by me as evidence, in which the writer says "I am commanded to inform you that any German steamer proceeding on or after the 5th August last through the Mediterranean on a voyage to Hamburg would, in their Lordships' opinion, have been in peril of capture by British or allied warships when outside neutral territorial waters." It is abundantly clear that the voyage from Messina to Hamburg could not in fact be continued, and I have no doubt that the master had no thought of attempting to continue it until after the termination of the war. How long the war would continue no one knew, but it was certain to last for so long and indefinite a period that the voyage was for all practical purposes abandoned when the master put into Messina.

The policy was against the usual perils including men-of-war, enemies, takings at sea, and restraints of princes, and Mr. Aspinall has argued that the loss of the venture, which, as the law now stands, constitutes a constructive total loss of the goods, was due to one of the perils insured against. He particularly relied on the words "men-of-war." What I have to consider is whether the goods were lost by any of the perils mentioned in the policy and in particular whether they were lost owing to men-of-war. The position was that when the master arrived at Messina he would have been in serious danger of capture if he had prosecuted his voyage, and he put into that port because he was afraid of that event happening. Does that bring him within the words of the policy? Whether the avoidance of a peril, or an attempt to avoid a peril, is the same thing as a loss by the peril depends very much on what the nature of the peril is, and it seems to me quite clear upon the cases that an attempt to avoid capture is not the same as a loss by capture. I do not think it is absolutely necessary that there should be a de facto capture; I think that appears from *Butler* v. *Wildman* (1), the case of the Spanish dollars. On the other hand it is quite clear that the avoidance of a peril under most circumstances is not the same as loss by the peril itself. That appears from a number of cases, *Hadkinson* v. *Robinson* (2), *Nickels & Co.* v. *London and Provincial Marine and General Insurance Co.* (3), and *Kacianoff* v. *China Traders Insurance Co.* (4) That being the state of the authorities, and bearing in mind that on the one hand actual capture is not necessary, and on the other that (to use an expression used in the *Kacianoff Case* (4)) the peril must have begun to operate, or (to borrow another expression from *Hadkinson* v. *Robinson* (2)) that the peril must operate directly and not circuitously, what one has to consider is what is the true view to be taken upon the facts in this case? It is obviously a question of degree, and that being so, the dividing line between one case and another must often appear very thin and subtle. It appears from the *Kacianoff Case* (4) that if the *Kattenturm* had been chased into Messina the peril of capture would have begun to operate, and I think in that

(1) (1820) 3 B. & Ald. 398.
(2) 3 Bos. & P. 388.
(3) 6 Com. Cas. 15.
(4) [1914] 3 K. B. 1121.

1915

BECKER, GRAY & CO. v. LONDON ASSURANCE CORPORATION.

Bailhache J.

case it might be said that the abandonment of the voyage, and the constructive total loss of the goods by the destruction of the venture, was caused by a peril within the policy. If one looks at *Butler* v. *Wildman* (1) precisely the same thing happened there, only in an accentuated degree. There not only was the ship chased by a hostile man-of-war, but the chase was so hot that the master of the ship preferred to throw the valuable cargo, the Spanish dollars, into the sea rather than that they should fall into the hands of the enemy. Though the dollars were not actually captured the Court held that there was a loss by capture. In the present case there was no chasing by a hostile man-of-war, nor indeed was any such man-of-war sighted by the *Kattenturm*; nor was she driven into Messina by the intelligence of a particular man-of-war being in the neighbourhood. The master went into that port because he feared, and rightly feared, that if he prosecuted his voyage the ship would be captured. Those being the facts, on which side of the line does the case fall? Had the peril, the peril of "men-of-war," begun to operate, or was this a case in which the master had gone into a port to avoid the commencement of the operation of that peril? That is a point about which different people will entertain different views. My own view is that the master went into Messina to avoid the commencement of the peril, and that at the time he went in it had not begun to operate. It may very well be that the assured would have desired to insure himself against that very event, for the goods were as much lost to him as they would have been if the ship had been captured. But I have to construe the words in this policy and to say whether the risks which are mentioned in it are risks which in fact caused the loss. I think they are not, and that the destruction of the venture was not caused by any risk insured against. In the case of *Sanday & Co.* v. *British and Foreign Marine Insurance Co.* (2), in which my judgment was affirmed by the majority of the Court of Appeal, I discussed this very point, and the view which I there expressed is that which I still entertain. I said: "One last point remains: Was the restraint of princes the proximate cause of the loss? The defendants say No,

(1) 3 B. & Ald. 398. (2) [1915] 2 K. B. 781.

and refer me to a line of cases of which *Hadkinson* v. *Robinson* (1) is an early example, and *Kacianoff* v. *China Traders Insurance Co.* (2) is, I think, the latest. The plaintiffs on the other hand refer me to *Miller* v. *Law Accident Insurance Co.* (3) It is, I think, correct to say that the *Hadkinson* v. *Robinson* (1) line of cases proceeds upon the principle that a loss which arises from steps taken to avoid a peril cannot be said to be due to the peril so avoided. In deciding within which set of authorities a given case falls it must always be borne in mind that much depends upon the character and description of the particular peril which has to be alleged and relied upon as the cause of the loss." Applying that test to the facts of this case, I have come to the conclusion that it is the opposite of *Sanday's Case* (4), and that these goods were not lost by a peril insured against.

Judgment for defendants.

Solicitors for plaintiffs: *Rehder & Higgs.*
Solicitors for defendants: *Waltons & Co.*

(1) 3 Bos. & P. 388.
(2) [1914] 3 K. B. 1121.
(3) [1903] 1 K. B. 712.
(4) [1915] 2 K. B. 781.

J. F. C.

1915
July 21, 28.

THE KING *v.* JUDGE RADCLIFFE.
Ex parte OXFORDSHIRE COUNTY COUNCIL.

Mental Deficiency—"Feeble-minded person"—Petition for Order sending to Institution—Petition by "the parent"—"Without visible means of support"—Jurisdiction as to Costs of Petition—Mental Deficiency Act, 1913 (3 & 4 *Geo.* 5, *c.* 28), *ss.* 1, 2, 6.

A "feeble-minded person" of full age is not "without visible means of support," within the meaning of sub-s. 1 (*b*) (i.) of s. 2 of the Mental Deficiency Act, 1913, merely because he has no means of his own and is incapable of earning his own living and is living with his parents, who are not legally liable to maintain him in their home.

Either parent of a "defective" can present a petition under s. 2 of the Act, but if it is presented by the mother, and the father can be found, his written consent or proof that it is unreasonably withheld is required by reason of the provisions of s. 6.

The judicial authority under the Act has jurisdiction in a proper case to order the costs of a petition to be paid by the local authority.

Rules Nisi for writs of certiorari.

A woman aged twenty-seven, who was a "feeble-minded person," had for many years prior to the passing of the Mental Deficiency Act, 1913, been kept in a home for weak-minded persons through the charity of a friend. Soon after that Act came into operation in April, 1914, she was removed to her home and resided with her parents. Her father worked upon a railway and earned 24*s.* a week. It was admitted that her home was a "good" or "comfortable" home, and there was no evidence that the parents were unable or unwilling to maintain their daughter or that the father had no sufficient means to enable him to do so; she had no means of her own and was incapable of earning her own living. The mother presented a petition in the county court under the Mental Deficiency Act, 1913 (1), asking for an order

(1) 3 & 4 Geo. 5, c. 28:

Sect. 1. "The following classes of persons who are mentally defective shall be deemed to be defectives within the meaning of this Act:—

"(*a*) Idiots; . . . .

"(*b*) Imbeciles; . . . .

"(*c*) Feeble-minded persons; . . . ."

Sect. 2, sub-s. 1. "A person who is a defective may be dealt with under this Act by being sent to or placed in an institution for defectives or placed under guardianship:—

"(*a*) at the instance of his parent or guardian, if he is an idiot or imbecile, or at the instance of his parent if, though not

under the Act sending her daughter to an institution for defectives. The father did not join in the petition and had neither consented nor refused his consent to it.

At the adjourned hearing of the petition the Oxfordshire County Council, who as the local authority under the Act had been served with notice of the proceedings, appeared and opposed the making of an order. The county court judge found that the defective was not "neglected," but he made a reception order sending her to an institution within the jurisdiction of the county council upon the ground that, as she had no means of her own and was incapable of earning her own living and was not legally maintainable in their home by her parents, she was "without visible means of support," within sub-s. 1 (*b*) (i.) of s. 2 of the Act; and he made a further order that the county council should pay the costs of the adjourned hearing because after receiving notice they had not appeared at the first hearing.

The county council obtained a rule nisi for a writ of certiorari in respect of the reception order upon the grounds that the petition was not presented by "the parent" and the consent of the father had not been given, and that the defective was not "without visible means of support," within the meaning of the Act; and also a rule in respect of the order as to costs upon the ground that it was made without jurisdiction and without legal or proper reasons.

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an idiot or imbecile, he is under the age of twenty-one; or

"(*b*) if in addition to being a defective he is a person—

"(i.) who is found neglected, abandoned, or without visible means of support, or cruelly treated. . . . ."

Sect. 4. "A defective subject to be dealt with under this Act otherwise than under paragraph (*a*) of subsection (1.) of section two of this Act may so be dealt with—

"(*a*) under an order made by a judicial authority on a petition presented under this Act . . . ."

Sect. 6, sub-s. 3. ". . . . Provided that—

"(*a*) where the petition is not presented by the parent or guardian, the order shall not be made without the consent in writing of the parent or guardian, unless it is proved to the satisfaction of the judicial authority that such consent is unreasonably withheld, or that the parent or guardian cannot be found, ..."

1915

REX v. JUDGE RADCLIFFE. OXFORDSHIRE COUNTY COUNCIL, *Ex parte.*

G. A. H. Branson showed cause. If the mother, who presented the petition, is not "the parent" within the proviso to sub-s. 3 of s. 6, it must be admitted that the necessary conditions have not been complied with. Sect. 71 provides that the expression "parent or guardian" shall include any person who undertakes or performs towards the defective the duty of a parent or guardian. The widest possible meaning, therefore, ought to be given to the word "parent" so as to indicate either parent. The mother is just as much the parent as the father is, and there is nothing in the statute to restrict the meaning of parent to the father when both parents are alive. Upon the facts the county court judge could properly decide that the defective was "without visible means of support" within the meaning of s. 2, sub-s. 1 (*b*) (i.); the word "found" may there mean so found as a fact by the judicial authority.

If the main order is right, the judge clearly had jurisdiction to order the county council to pay costs; by s. 19 the judicial authority is given the same jurisdiction as to costs as a county court judge, and by s. 113 of the County Courts Act, 1888, the judge has power to award costs as he shall think just. Here the county council, having been served with notice of the proceedings as required by the Act, chose to appear and oppose in their own interests as the authority liable to bear the expenses if the defective was sent to an institution, and thereby became a party to the proceedings.

R. V. Bankes, K.C., and *Herbert Davey*, in support of the rules. The scheme of this Act is to throw the duty of administering it upon the local authority (s. 30), and proceedings for an order cannot be taken by a parent at all unless expressly authorized by the Act, as in s. 2, sub-s. 1 (*a*). If a parent can present the petition, "the parent," in the proviso to sub-s. 3 of s. 6, means the father when he is alive, and not the mother, and the mother cannot petition without the written consent of the father unless one of the conditions of the proviso is fulfilled.

The words of s. 2, sub-s. 1 (*b*) (i.), "found . . . . without visible means of support," do not mean judicially found, but that the defective is actually found by some person other than the parent in the condition of being without means of support.

Further, there was no evidence here upon which the judicial authority could properly find that this woman was "without visible means of support"; she was living with her parents in a comfortable home where they were in fact supporting her.

The judicial authority had no jurisdiction to order the county council to pay costs; they were not parties to the proceedings at all: *Boulter* v. *Kent Justices.* (1)

July 28. The judgment of the COURT (Lord Reading C.J., Darling and Lush JJ.) was delivered by

LUSH J. (2) In this case the Oxfordshire County Council obtained rules nisi for writs of certiorari to quash two orders made by the learned county court judge at Banbury, acting as the judicial authority under the Mental Deficiency Act, 1913. One was a reception order directing that a daughter of the petitioner, aged twenty-seven, should be removed to an institution for the treatment of defectives at Stoke Park near Bristol, within the jurisdiction of the applicants: the other was an order for the payment of certain costs by the applicants. Cause was shown against the rules. We have to say whether the learned county court judge had any sufficient and proper materials before him to justify him in making these orders and whether in making them he acted on proper grounds contemplated by the statute.

The facts, which are not really in controversy, are as follows: The petitioner resides with her husband, who is at work upon a railway and earns 24*s.* a week. They have two children. The defective, who as we have stated is twenty-seven years of age, was for many years prior to the passing of the Mental Deficiency Act, 1913, kept in a home for weak-minded persons through the charity of a friend. Soon after the Act came into operation the subscription was stopped and the defective was removed to her home and was under the charge of her parents for several months. Her mother then presented the petition. It was alleged, but the learned judge negatived the contention, that she was "neglected" in her home. It was admitted that it was a "good" or "comfortable" home, and there was no evidence

(1) [1897] A. C. 556. (2) The judgment was written.

1915

REX v. JUDGE RADCLIFFE. OXFORDSHIRE COUNTY COUNCIL, *Ex parte.*

beyond the presentation of the petition itself that her parents were unable or unwilling to maintain her or that her father had not sufficient means to enable him to do so. The father did not join in the petition and had not consented in writing to it. No evidence of his assent was given.

It was contended for the applicants on this evidence, first, that the proper person to petition was the father of the defective and not the mother; and secondly, that the defective not having been neglected or abandoned or without visible means of support, there were no materials before the learned judge to justify him in making the order. The learned judge held that, inasmuch as the defective had no means of her own and had not the ability to earn her own living and was not legally maintainable in the home by her parents, she was, within the meaning of s. 2, sub-s. 1 (*b*), of the Act, a person "without visible means of support"; "she was really living on charity," the learned judge said, "and had no means of her own at all." On that ground he made the reception order. He ordered the applicants to pay the costs of the adjourned hearing because they did not attend at the first hearing after receiving notice.

Now the Act, by s. 2, makes provision for the placing of defectives in an institution (or placing them under guardianship) and enacts under what conditions and by what procedure the power may be exercised according to the circumstances of the particular case. Sub-s. 1 (*a*) provides that if the defective is an idiot or imbecile his "parent or guardian" may cause the defective to be dealt with; if he is not an idiot or imbecile but is under the age of twenty-one, his "parent" may cause him to be so dealt with. Sect. 3 provides how the parent or guardian shall act in these cases. The present case is not within sub-s. 1 (*a*) or s. 3, as the defective is over twenty-one. It will be observed that proof that the defective is neglected or without visible means is not necessary in those cases. Sub-s. 1 (*b*) of s. 2 provides for cases of a different kind, including cases like the present. It enacts that if, in addition to being a defective, the person whom it is desired to place in an institution or under guardianship "is found neglected, abandoned, or without visible means of support, or cruelly treated," or—then follow other cases, including cases

in which the defective is found guilty of any criminal offence, or is an habitual drunkard, &c.—he may be dealt with. The allegation here was that the defective was a person who was neglected and without visible means of support. Sect. 4 provides how these cases are to be dealt with. It enacts that an order must be made by a judicial authority on a petition presented under the Act; and s. 5 provides that "any relative or friend" of the alleged defective may present it, or any officer of the local authority authorized under the Act to make it. Sect. 6 provides that "where the petition is not presented by the parent or guardian, the order shall not be made without the consent in writing of the parent or guardian, unless it is proved . . . . that such consent is unreasonably withheld, or that the parent or guardian cannot be found." By s. 13 a judicial authority may make an order requiring the defective, or any persons liable to maintain him, to contribute towards his expenses.

Now with regard to the first point that was taken, we are of opinion that either parent of the defective may petition under s. 2, sub-s. 1 (*b*), as a relative or friend, but that where the father is living his consent in writing must be produced or that the proof must be given which is provided for by s. 6. That section speaks of "the" parent or guardian, and we do not think that the judicial authority was intended to act, as the learned judge appears to have considered he could act, on the petition of the mother alone not assented to by the other parent. This point, however, does not appear to have been taken.

The more important question is the second question that was raised, and we cannot agree with the view taken by the learned judge with regard to it; we do not think that the mere fact that the defective has no legal property of his own, and is unable to earn his own living, and has no legal right to compel his parents to maintain him in the home, can justify the conclusion that he has no "visible means of support." Those words appear to us to be applicable to cases where the defective is in fact not being maintained or taken care of, or where, at all events, those who have taken care of him are turning him adrift or threatening to do so. The words "without *visible* means" seem to denote

1915

REX v. JUDGE RADCLIFFE. OXFORDSHIRE COUNTY COUNCIL, *Ex parte.*

something akin to being neglected or abandoned. A defective in a comfortable home, who is being properly taken care of, may have no property and those maintaining him may be under no obligation to do so, but that is very different from being without any visible means of support. Mr. Bankes contended that the words "found neglected," &c., point to some person, e.g., some officer of the local authority, finding the defective homeless or uncared for, and s. 15 appears to point to this; and we agree that the word "found" does not only mean "found by a Court," but may mean found in fact. Such a case as Mr. Bankes suggested is no doubt one kind of case contemplated by the section, but we think that it would be a too narrow view to take of the section if we were to say that a parent himself may not petition on one of these grounds. If a mother, for example, possessed of small means, finds that she cannot take proper care of a defective daughter over twenty-one, and that the defective strays away from home and is in that way "neglected," it would be unreasonable to say that she cannot petition. We think that she could. It is in the public interest that a defective should not be permitted to wander abroad unattended and neglected, and the Act was passed to prevent that condition of things. But in this case there seems to have been no evidence of the existence of such a state of things, and the learned judge found that the defective was not neglected. His view, as we have said, was that the defective had no visible means of support, and if this is right, a son or a daughter of a person who had ample means and was able to maintain them and had not neglected them might be removed to an institution at the instance either of the parents or a stranger, and we do not think that that is what the Act means.

We, therefore, are of opinion that the learned judge acted on an erroneous view in making the order and that, apart from the fact that the father was not a party, the defective not being neglected or without visible means of support, the order was not justified, and we must make the rules absolute as to both the orders without costs. It will be without prejudice of course to a fresh petition being presented on fresh materials.

With regard to the order as to the costs, we think the judicial

authority has jurisdiction in a proper case to order costs to be paid, but as the reception order will be quashed it will be unnecessary to consider whether this was a proper case in which to order them.

1915

REX v. JUDGE RADCLIFFE. OXFORDSHIRE COUNTY COUNCIL, *Ex parte.*

Rules made absolute.

Solicitors for applicants: *Davenport, Cunliffe & Blake.*
Solicitor for respondent: *The Treasury Solicitor.*

J. H. W.

BOTHAMLEY AND ANOTHER, APPELLANTS *v.* JOLLY, RESPONDENT.

1915
June 10.
July 30.

Local Government—Public Health—Offences—Sale of Diseased Live Animal—Intended for Food of Man—No Exposure for Sale by Seller—Seizure and Condemnation of Carcase in Possession of Purchaser—Liability of Seller to Penalty—Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *ss.* 116, 117—*Public Health Acts Amendment Act*, 1890 (53 & 54 *Vict. c.* 59), *s.* 28.

A person who has sold diseased meat intended for human food cannot be convicted of an offence, under s. 117 of the Public Health Act, 1875, as amended by s. 28 of the Public Health Acts Amendment Act, 1890, for having sold it unless he has exposed it for sale.

The appellants, without having exposed it for sale, sold a diseased live bullock to a butcher, knowing that he intended to use it for human food. The butcher, having killed the bullock, divided the carcase, less the parts usually severed and removed, into two halves, and hung it up in his slaughter-house; the carcase was there seized by the medical officer of health and was condemned by a justice of the peace:—

Held, that the appellants could not be convicted of an offence under s. 117 of the Public Health Act, 1875, as amended by s. 28 of the Public Health Acts Amendment Act, 1890, for having sold the bullock because there had been no exposure for sale by them, and, further, because the article of food which had been seized and condemned was not the article which had been sold by them.

Firth v. *McPhail* [1905] 2 K. B. 300 and *Salt* v. *Tomlinson* [1911] 2 K. B. 391 considered.

CASE stated by justices of Peterborough.

An information was preferred by the respondent, the medical officer of the borough of Peterborough, on behalf of the corporation against the appellants for having, on December 3, 1914, unlawfully sold to one Davis a red bullock which was intended for the

1915

BOTHAMLEY v. JOLLY.

food of man, the same being diseased, unsound, and unfit for the food of man, contrary to ss. 116 and 117 of the Public Health Act, 1875 (1), and s. 28 of the Public Health Acts Amendment Act, 1890 (2), and which was duly seized and condemned by a justice of the peace and ordered to be destroyed.

Upon the hearing of the information the following facts were admitted or proved:—Part III. of the Public Health Acts Amendment Act, 1890, had been duly adopted by the local authority. The bullock in question had been purchased by the appellants from a cattle dealer on December 2, 1914. It was placed by them in a barn occupied by one of them, and on December 3 was sold by them to one Davis, a butcher. They were to have no interest in what might be realized on the transaction by Davis. Early on December 6 the bullock was removed from the barn to the slaughter-house of Davis, and at 10.30 the same morning was there slaughtered by him, and the carcase thereof,

(1) 38 & 39 Vict. c. 55, s. 116: "Any medical officer of health or inspector of nuisances may at all reasonable times inspect and examine any animal carcase meat . . . . exposed for sale, or deposited in any place for the purpose of sale, or of preparation for sale, and intended for the food of man . . . .; and if any such animal carcase meat . . . . appears to such medical officer or inspector to be diseased or unsound or unwholesome or unfit for the food of man, he may seize and carry away the same himself or by an assistant, in order to have the same dealt with by a justice."

Sect. 117: "If it appears to the justice that any animal carcase meat . . . . so seized is diseased or unsound or unwholesome or unfit for the food of man, he shall condemn the same, and order it to be destroyed or so disposed of as to prevent it from being exposed for sale or used for the food of man; and the person to whom the same belongs or did belong at the time of exposure for sale, or in whose possession or on whose premises the same was found, shall be liable to a penalty not exceeding 20*l.* for every animal carcase or fish or piece of meat . . . ."

(2) 53 & 54 Vict. c. 59, s. 28: "(1.) Sections 116 to 119 of the Public Health Act, 1875 (relating to unsound meat), shall extend and apply to all articles intended for the food of man, sold or exposed for sale, or deposited in any place for the purpose of sale, or of preparation for sale within the district of any local authority.

"(2.) A justice may condemn any such article, and order it to be destroyed or disposed of, as mentioned in section 117 of the Public Health Act, 1875, if satisfied on complaint being made to him that such article is diseased, unsound, unwholesome, or unfit for the food of man, although the same has not been seized as mentioned in section 116 of the said Act."

less the head and entrails and parts usually severed and removed, was divided down its back and the two halves hung up in the slaughter-house. About noon the same day the appellants visited the slaughter-house and there saw the carcase of the bullock and were paid by Davis the agreed price. Shortly afterwards on the same day the two halves of the carcase of the bullock, together with the head, entrails, and all other parts except the skin, horns, and hoofs, were seized by the respondent and were subsequently duly condemned by a justice of the peace as being unfit for the food of man and were ordered to be and were thereupon destroyed. On December 16 an information was preferred by the respondent against Davis for that on December 6 he did unlawfully have in his possession on certain premises in his occupation two pieces of the carcase of a bullock which were deposited there for the purpose of preparation for sale for the food of man, the same being diseased, unsound, and unwholesome and unfit for the food of man, contrary to s. 117 of the Public Health Act, 1875, and which were duly seized, condemned by a justice of the peace, and ordered to be destroyed. Upon the hearing of that information Davis was duly convicted and fined. The two halves of the carcase of a bullock referred to in that information were the two halves of the carcase of the bullock sold to Davis by the appellants. At the date of the sale of the bullock by the appellants to Davis it was suffering from tuberculosis, and the meat thereof would be unsound and unfit for the food of man. There was no seizure or condemnation of the bullock whilst alive or any seizure or condemnation otherwise than as before stated.

The appellants contended that they ought not to be convicted because they had sold and delivered the bullock to Davis in its living state and were not aware and could not themselves have discovered that it was suffering from tuberculosis, and that their interest in and responsibility for the bullock came to an end upon the sale to Davis, and that whatever intention he might have had as to the disposal of the meat after he had killed the bullock was no concern of theirs, and that there never was any seizure or condemnation of the bullock before death, and that the portions of the carcase thereof which were seized and

1915

BOTHAMLEY v. JOLLY.

condemned were not so seized and condemned whilst in their possession or upon their premises, and that therefore they ought not to be convicted. It was contended for the respondent that the word "animal" in ss. 116 and 117 of the Public Health Act, 1875, as amended by s. 28 of the Public Health Acts Amendment Act, 1890, applied to a live animal, and that it was unnecessary to support a conviction that there should be a seizure before death or while still in the appellants' possession, or that the appellants should have had knowledge of the disease from which the bullock was suffering, and it was submitted that upon the facts proved or admitted the appellants and each of them could properly be convicted of the offence charged.

The justices found as a fact that the bullock was purchased by Davis with the intention of its carcase being used for the food of man and that the appellants had knowledge of that intention, and they convicted them of the offence charged. The question for the opinion of the Court was whether upon the facts stated and under the circumstances above set out the justices came to a correct determination and decision in point of law.

Schiller, *K.C.*, and *H. Dobb*, for the appellants. To constitute an offence under s. 117 of the Public Health Act, 1875, the animal carcase or meat in question must be exposed for sale, in which case the owner commits the offence, or be found in the possession or on the premises of the person charged. Sects. 116 and 117 were amended by s. 28 of the Act of 1890 by removing the necessity for seizure as prescribed in s. 116 and by making it an offence to sell diseased food. Sect. 28 was passed for the purpose of meeting a case like *Vinter* v. *Hind* (1), where meat was sold and carried away by the customer before it was seized. In order, however, to make a person liable for selling there must still be exposure for sale by him. "Sold," in s. 28, means sold after exposure for sale, and not a sale before exposure for sale. That was expressly decided in *Firth* v. *McPhail* (2), where it was held that there must be exposure for sale. Exposure for sale means exposure to view in the sight of purchasers: *Crane* v. *Lawrence*. (3)

(1) (1882) 10 Q. B. D. 63. (2) [1905] 2 K. B. 300.
(3) (1890) 25 Q. B. D. 152.

This point was not decided in *Salt* v. *Tomlinson* (1), for in that case there was exposure for sale before the sale, and any observations of Pickford J. which may seem to conflict with the decision in *Firth* v. *McPhail* (2) were merely obiter.

A live bullock is not an article of food within ss. 116 and 117 as amended by s. 28 of the Act of 1890. Further, the live bullock which was sold by the appellants was not the same thing as that which was seized and condemned, which was only a part of the carcase, and the appellants therefore could not be convicted of the offence with which they were charged. [*Barlow* v. *Terrett* (3) was referred to.]

H. A. McCardie, for the respondent. Exposure for sale is not an essential ingredient of an offence under ss. 116 and 117 of the Act of 1875: *Mallinson* v. *Carr* (4); *Cork Rural District Council* v. *Walsh*. (5) Many cases show that the condemnation must be within a reasonable time after the sale, exposure, or other act impugned, and in *Waye* v. *Thompson* (6) it was decided that the owner of the meat condemned may, in subsequent proceedings against him, give evidence as to its condition when condemned. The construction for which the respondent contends will not, therefore, impose any hardship upon the seller of unsound food. The word "sold," introduced by s. 28 of the Act of 1890, was intended to bring in a new offence and to include any sale and delivery of an article of food; there is nothing to show that it must be limited to a sale after exposure for sale, and there can be no reason for so limiting it; and in *Salt* v. *Tomlinson* (1) it was so decided. In *Firth* v. *McPhail* (2) there was not in fact a sale at all and therefore this point did not arise for decision. The provisions of ss. 116 and 117 apply to a live animal: *Moody* v. *Leach*. (7) The whole of the bullock which was intended for the food of man was seized and condemned.

Schiller, K.C., replied.

Cur. adv. vult.

(1) [1911] 2 K. B. 391.
(2) [1905] 2 K. B. 300.
(3) [1891] 2 Q. B. 107.
(4) [1891] 1 Q. B. 48.
(5) [1908] 2 I. R. 234.
(6) (1885) 15 Q. B. D. 342.
(7) (1880) 44 J. P. 459.

1915

BOTHAMLEY v. JOLLY.

July 30. (1) LORD READING C.J. The appellants sold a red bullock on December 3, 1914, to a butcher, one John Davis, which they had purchased the previous day from a cattle dealer. The animal was suffering from tuberculosis and the meat thereof was unsound and unfit for human food, but at the time of the sale had not been exposed for sale. On December 6 the animal was removed from the appellants' barn to the slaughter-house of Davis, and on the same morning was there slaughtered by Davis, and the carcase, less the parts usually severed and removed, was divided down its back and the two halves hung up in the slaughter-house. Later on the same day the two halves of the carcase were seized by the respondent and condemned by a magistrate as being unfit for the food of man and were ordered to be destroyed. The appellants knew at the time of sale that Davis purchased the animal with the intention of using its carcase for the food of man. Upon these facts the appellants were convicted of having unlawfully sold a red bullock to John Davis which was intended for the food of man, "the same being diseased and unsound and unfit for the food of man contrary to ss. 116 and 117 of the Public Health Act, 1875, and s. 28 of the Public Health Acts Amendment Act, 1890, and which was duly seized and condemned by a justice of the peace."

On behalf of the appellants it is contended that the conviction is bad on the ground that at the time of the alleged offence there had been no exposure for sale and that therefore there was no liability to a penalty in respect of a sale. They argue that sub-s. 1 of s. 28 was passed for the purpose of extending the application of ss. 116 and 117 of the Act of 1875 from the enumerated articles to *all* articles intended for the food of man, but that it was not intended to impose a penalty in respect of a sale made without exposure for sale. The respondent, on the other hand, contends that the words "all articles intended for the food of man sold or exposed for sale" must be held to have extended the category of persons committing an offence so as to include the seller of articles whether the sale takes place with or without an exposure for sale. The problem is not easy of solution, as the language

(1) The judgments were written.

used in the amending section makes it difficult to ascertain the intention of Parliament. The object of this legislation is to protect the public against the sale of meat and other articles of food intended for human consumption which are in a condition dangerous to human health. Under s. 116 of the Public Health Act, 1875, the proper official may seize the unfit article, and under s. 117 a justice of the peace may condemn it and order it to be destroyed. Under s. 117 the person to whom the article so seized and condemned belongs or did belong at the time of exposure for sale or the person in whose possession or on whose premises the same was found is liable to a penalty. In *Vinter* v. *Hind* (1) it was decided that, where a butcher sold diseased meat to a customer who took it home and subsequently handed it over to an inspector when it was condemned by a justice, the butcher could not be convicted under the statute as the meat had not been seized as prescribed by s. 116. He was the person to whom the meat belonged at the time of the exposure for sale, but s. 117 only imposed the penalty if seizure and condemnation had taken place in accordance with the Act of Parliament. Sect. 28 of the Public Health Acts Amendment Act, 1890, amended the law by extending and applying ss. 116 to 119 of the Public Health Act, 1875, "to all articles intended for the food of man sold or exposed for sale" and by giving power to a justice to condemn the article although it had not been seized as prescribed in s. 116 of the Public Health Act, 1875.

In *Firth* v. *McPhail* (2) the effect of the 1st sub-section of s. 28 was considered, but the precise point for decision arose in relation to the deposit for the purpose of sale by a person, on premises other than his own, of diseased meat belonging to him and intended for the food of man. It was held that such a person had not committed an offence under these sections. The reason was that the meat was not found in his possession or on his premises, neither did it belong to him at the time of the exposure for sale. It was contended in that case that under s. 117 there must be an exposure for sale before a penalty could be inflicted on the person to whom the meat belonged at the time of exposure, and that s. 28 of the Act of 1890 had altered the law in that

(1) 10 Q. B. D. 63. (2) [1905] 2 K. B. 300.

1915

BOTHAMLEY v. JOLLY.

Lord Reading C.J.

respect by extending and applying s. 117 to goods sold irrespective of the fact or time of exposure for sale. It was not necessary for the Court to decide that point, but it expressed the opinion that s. 28 had not made such an alteration in the law and that the extension made was in respect of a sale taking place after an exposure for sale. The 2nd sub-section did not in terms permit a penalty to be imposed when the article condemned had not been seized in accordance with s. 116, and the question as to the effect of this amending section in regard to penalties came before the Court in *Salt* v. *Tomlinson*. (1) It was there decided that, by virtue of the amending section, a penalty could be imposed upon a person who exposed for sale on his premises and sold unsound meat which was subsequently condemned notwithstanding that it had not been seized in accordance with s. 116. It is to be observed that in that case there had been exposure for sale by the defendant, and therefore the point raised in the present case was not decided. The importance of this decision is that it construed sub-s. 2 of the amending section as conferring jurisdiction upon the justice not only to condemn an unsound article and to order it to be destroyed, but also to impose a penalty notwithstanding that the article had not been seized as prescribed in s. 116. Before the amending section was passed a penalty could not be imposed unless there had been both seizure in compliance with s. 116 and condemnation: *Vinter* v. *Hind*. (2)

The question raised by the appellants in the present case is whether s. 28 has made it an offence for a person to sell, without exposure for sale, meat belonging to him which was in fact unfit for human food and was subsequently seized and condemned. It is contended by the respondent that the effect of the amending s. 28 is to make ss. 116 and 117 read as if the words "sold or" were inserted before "exposed for sale," whenever they occur, and "sale or" before "exposure for sale." If this interpretation of s. 28 is correct, an offence has been committed by the appellants. Notwithstanding the beneficial object of this legislation and the desire not to minimize the protection it gives to the public, I am unable to accept so wide a construction of the

(1) [1911] 2 K. B. 391. (2) 10 Q. B. D. 63.

1915

BOTHAMLEY v. JOLLY.

Lord Reading C.J.

language of the amending section. This construction would make all persons liable to a penalty who had successively sold the article subsequently condemned and were the owners of it at the time of sale, notwithstanding that they did not then know that the article was unfit for human food. If we accepted the respondent's contention, every person who, during the limitation period of six months under the Summary Jurisdiction Acts, sold an article subsequently condemned and which belonged to him at the time of sale could be convicted and would become liable to a penalty, for it must be borne in mind that mens rea is not a necessary element of the offence charged. A person can be convicted whether he knew or did not know at the time of making the sale that the article was unfit for the food of man: *Mallinson* v. *Carr* (1), per Stephen J.; *Hobbs* v. *Winchester Corporation.* (2) It may well be and no doubt is, as the respondent contends, that in extreme cases the justices would refuse to convict or inflict a penalty, but no person should be subjected to the risk of conviction unless we come to the conclusion from the plain and reasonable meaning of this statute that Parliament intended it. In my judgment the Court should not construe the section as having so far-reaching an application if another and more limited interpretation can reasonably be given, as I think it can, to the amendment under discussion. It is clear that the words of the amending sub-section extend and apply the provisions of the Act of 1875 (which include only the articles enumerated under the sections of that Act) to all articles intended for the food of man, but there is, undoubtedly, difficulty in arriving at the meaning of the words "sold or exposed for sale." In *Firth* v. *McPhail* (3) Lord Alverstone C.J. in considering these words said: "The more natural construction of that part of the section seems to me to be that exposure for sale is a condition which must have existed before the penalty under that section can be inflicted. . . . . It is too strong to say that the penal part of s. 117 has been extended in the sense of doing away with that which was, if I am right, a specific condition precedent to the power to inflict a penalty—namely, exposure for sale. In my opinion the true

(1) [1891] 1 Q. B. 48, 52. (2) [1910] 2 K. B. 471.
(3) [1905] 2 K. B. 300.

1915

BOTHAMLEY v. JOLLY.

Lord Reading C.J.

view of s. 28, sub-s. 1, is that it extends the provisions of ss. 116 and 117 to all articles intended for the food of man"; and Kennedy and Ridley JJ. concurred. I think the opinion expressed by Lord Alverstone C.J., that a narrower interpretation should be given to the words under discussion, was right. This view is not in conflict with the decision in *Salt* v. *Tomlinson*. (1) In that case there had been exposure for sale by the owner of the article exposed, and once the Court arrived at the conclusion, as it did, that it was no longer necessary for a conviction that the article should have been seized in accordance with s. 116, an offence had been committed within the words of s. 117. In the present case the appellants were convicted although they had not exposed the article for sale. It neither belonged to them at the time of the exposure nor was it found in their possession or on their premises. I cannot find words in s. 28 making it an offence for a person to sell an unsound article which belonged to him at the time of sale. The offence created by s. 117 is limited to the person to whom the article belongs at the time of exposure for sale or in whose possession or on whose premises it was found. The amending section has not, in my judgment, extended the category of persons liable to be convicted so as to include the seller of the article subsequently condemned who owned the article at the time of sale. The true view of s. 28 is, in my opinion, that it extends the operation of ss. 116 to 119 of the Act of 1875 (which are the sections relating to unsound meat, &c.) by making these four sections apply to all articles instead of only to the articles enumerated in the Act of 1875, and it also does away with the necessity for a seizure in compliance with s. 116 before there can be a conviction. Except as just stated, s. 28 does not create a new offence under s. 117. The person who commits an offence under this section as amended is still the person who is the owner of the unsound article at the time of the exposure or in whose possession or on whose premises it is found. The appellants, who had sold the article without exposing it for sale, have therefore not committed an offence under these statutes, and the conviction must be quashed.

A further ground for allowing this appeal is that the conviction

(1) [1911] 2 K. B. 391.

1915

BOTHAMLEY v. JOLLY.

Lord Reading C.J.

is bad on the face of it. There is no such offence known to the law as that of selling the animal or article in the circumstances stated in the summons or conviction. The form of the summons and conviction in this case illustrates the difficulty of the prosecution in proving that an offence under the statute had been committed by the appellants. An offence is charged and a conviction is recorded which cannot be brought within the words of the statute, for it is neither alleged nor found that the appellants owned the article at the time of sale, and that is an essential element of the offence. Notwithstanding that the point is not stated in the case, the Court on this ground alone could not allow the conviction to stand. The appeal must be allowed, with costs.

RIDLEY and DARLING JJ. agreed with the judgment of Lord Reading C.J.

AVORY J. I should have been content to base my judgment in this case on the ground that the appellants have been summoned for and convicted of an alleged offence which is not an offence under the Public Health Act, 1875, as amended by the Act of 1890. This is not a mere matter of form but of substance, for if the statute had made it an offence for a person to sell or expose for sale an animal or article intended for the food of man which was unwholesome or unfit for the food of man the difficulties which have been the subject of discussion in this and previous cases would not have arisen. This omission has been remedied in the Public Health (London) Act, 1891, which by s. 47, sub-s. 3, provides for proceedings being taken against a person who sells such an animal or article and provides a special defence for such person. Moreover in this case a penalty has been imposed in respect of the sale of a red bullock alleged to have been seized and condemned. The penalty under the statute can only be imposed for "every animal or piece of meat so condemned." The red bullock was not condemned. The two sides of beef which were condemned cannot, I think, be called a bullock.

As this case has, however, been argued on a suggestion that

1915

BOTHAMLEY v. JOLLY.

Avory J.

previous decisions of the Court were in conflict with each other, I desire to express my concurrence in the judgment of the Lord Chief Justice, which I have had the opportunity of reading, and to add that I see no reason for differing from the previous decisions of the Court which have been referred to. The form of the summons in *Salt* v. *Tomlinson* (1) is open to criticism in that it alleges the offender was the person "to whom the meat belonged at the time when it was sold"; it should have been "when it was exposed for sale," and this may have led to some inaccuracy of expression in the judgments, which were not directed to the point now in question.

In my opinion the only effect of s. 28 of the Act of 1890, beyond extending the provisions of the Act of 1875 to all articles of food, is to enable the officer of the local authority, under s. 116, to inspect, examine, and seize an article which has been sold and to get rid of the qualification in s. 117 introduced by the words "so seized" as interpreted by *Vinter* v. *Hind* (2), and that it ought not to be read as amending the latter part of s. 117 which relates to the persons liable to penalties so as to create a new offence on the part of the person selling. In other words the only persons under this Act of 1875 who are liable to penalties are (1.) the person to whom the article belonged at the time of exposure for sale, (2.) the person in whose possession or on whose premises it was found. This view is, I think, strongly confirmed by the decision in *Billing* v. *Prebble* (3), where Wills and Wright JJ. held that sub-s. 3 of s. 47 of the Public Health (London) Act, 1891, created a new offence and that sub-s. 2 of that section was an enlarged edition of s. 117 of the Act of 1875 and not applicable to the case of a person selling unsound articles.

The appellants ought, I think, to have been charged with aiding, abetting, counselling, and procuring the man Davis to commit the offence of which he was convicted.

ROWLATT J. I agree that this conviction is bad on the ground that the statute has not made it penal to sell and therefore the

(1) [1911] 2 K. B. 391. (2) 10 Q. B. D. 63.
(3) (1896) 66 L J. (Q.B.) 180.

summons was bad. Secondly, I think that the article condemned, namely, the beef, never belonged to the appellants and the charge failed on that ground. Thirdly, even neglecting the change in the article, I do not think the facts disclosed any offence. The article was not found in the possession of the appellants, and to make them liable on the ground of property I think it was essential to show that it was exposed for sale while belonging to them. It seems to me that the word "sold" was introduced by the Act of 1890 merely to get rid of the difficulty brought to light by *Vinter* v. *Hind.* (1) The jurisdiction to deal with the article and its owner was no longer to terminate on the cessation of the exposure by the completion of a sale. In my opinion one is driven to this view of the statute by the consideration that s. 117 has never been modified by making any one liable to conviction for standing in any relation to a sale generally or to the article at the moment of or immediately before a sale generally. I do not think, however, that this solves the difficulty caused by the necessity of discovering some limit beyond which the prosecution is not to go back for the purpose of convicting a person in respect of ownership of an article subsequently condemned. The article may be successively sold in an unfit state by as long a series of sellers and over as long a space of time whether they sell on exposure for sale or without exposure for sale.

In my view a person is not liable to conviction unless he was the owner at the time of an exposure leading to the condemnation. Under the Act of 1875 there can be no doubt that the scheme of the legislation was that the process had to go straight through from the seizure on the view during exposure or deposit for sale to the condemnation of the article and the conviction of the person owning it at the time of the particular exposure or having it found in his possession. Although the Act of 1890, if all that was said in *Salt* v. *Tomlinson* (2) is correct, allows a person to be convicted in respect of an article condemned without seizure under the Act of 1875, it has not in my opinion made so great a change as to allow the article to be condemned in respect of one dealing with it and persons to be

(1) 10 Q. B. D. 63. (2) [1911] 2 K. B. 391.

1915

BOTHAMLEY v. JOLLY.

Rowlatt J.

convicted consequentially on that condemnation in respect of other previous dealings with it. The question still remains how recent must the sale or exposure for sale be in order to have the article condemned on that ground. No such difficulty arose under the Act of 1875 because then seizure could only take place in respect of an existing state of things, namely, exposure or deposit. Now that the jurisdiction may be exercised after the sale, this difficulty does present itself, but it does not come up for solution on the present occasion. I agree that the appeal succeeds.

Appeal allowed.

Solicitor for appellants: *W. H. Sturton.*

Solicitors for respondent: *Chamberlain & Co., for Mellows & Son, Peterborough.*

J. H. W.

C. A.

1915

April 16, 19, 20; *May* 11.

[IN THE COURT OF APPEAL.]

GLAMORGAN COUNTY COUNCIL *v.* CARDIFF CITY COUNCIL AND SWANSEA BOROUGH COUNCIL.

Local Government—County Boroughs—Adjustment of Financial Relations to County—Appointment of Arbitrator to make Equitable Adjustment—Power of Arbitrator—Local Government Act, 1888 (51 *&* 52 *Vict. c.* 41), *ss.* 23, 32, 62.

On the creation of the city of Cardiff and the borough of Swansea (which had theretofore been part of the administrative county of Glamorgan) as county boroughs, commissioners appointed under the Local Government Act, 1888, made an Order in 1892 as to the adjustment of the financial relations of the county boroughs with the county, one provision of which was that the cost of the maintenance of main roads should be taken into account before dividing the proceeds of the local taxation licences and estate duty grant. In 1909 the Local Government Board, being satisfied that that adjustment had become inequitable, appointed an arbitrator under s. 32, sub-s. 6, of the Act "to make a new equitable adjustment as if he were the commissioners under the Act." The arbitrator made an award which did not follow the principle on which the Order of the commissioners was made, and

which made no allowance in respect of the cost of the maintenance of main roads:—

Held, that the arbitrator was not bound to follow the principle upon which the commissioners had acted in making their Order, and that he was not bound as a matter of law to take into account the cost of the maintenance of main roads.

APPEAL from the decision of Lawrence J. upon a special case stated by Sir Hugh Owen, G.C.B., upon an arbitration as to an equitable adjustment of the financial relations between the Glamorgan County Council and the county boroughs of Cardiff and Swansea. The case was as follows:—

Whereas it is provided by s. 32, sub-s. 6, of the Local Government Act, 1888, that "at any time after the end of five years from the date of an agreement or award adjusting the financial relations of any county and borough, if the council of either the county or borough satisfy the Local Government Board that the adjustment has become inequitable and that the councils are unable to agree on a new adjustment, the Board shall appoint an arbitrator, and such arbitrator shall proceed to make a new equitable adjustment as if he were the commissioners under the Act of 1888, and the provisions of that Act shall apply accordingly," and, by s. 1 of the Local Taxation (Customs and Excise) Act, 1890, it is enacted that the residue of the English share of the duties to be distributed under sub-s. 1 (*b*) of that section "shall be the subject of an adjustment between counties and county boroughs according to section 32 of the Act of 1888."

And whereas the Local Government Act Commissioners by an Order dated May 2, 1892, made an adjustment under s. 32 of the Act of 1888 and s. 13 of the Swansea Corporation Act, 1889, respecting the distribution of the proceeds of the local taxation licences and probate duty grant (now the estate duty grant), and by art. II. of that Order it was provided as follows:—

"Out of the aggregate proceeds of the local taxation licences and probate duty grant, payable out of the local taxation account, under ss. 20 and 22 of the Local Government Act, in respect of the financial year ended March 31, 1892, and of each succeeding financial year, to or on behalf of the county of Glamorgan and county boroughs of Cardiff and Swansea, there

C. A. 1915

GLAMORGAN COUNTY COUNCIL v. CARDIFF CITY COUNCIL AND SWANSEA BOROUGH COUNCIL.

shall be paid from the said account to the Glamorganshire County Council and to the councils of the said county boroughs the sums severally next hereunder stated against the name of the county and of each such county borough; or, if the said aggregate proceeds shall in any year fall short of the total of the sums mentioned, then the same shall be divided between the said county and borough councils in the proportion of such sums, viz.:

County of Glamorgan	£34,616
County borough of Cardiff	11,760
County borough of Swansea	8,526
	£54,902

"The remainder, if any, of the said aggregate proceeds shall in each year be divided and paid from the said account to the said county and borough councils in proportion to the sums severally hereunder stated against the name of the county and of each county borough, viz.:

County of Glamorgan	£1,816,444
County borough of Cardiff . . .	632,583
County borough of Swansea . . .	269,886"

And whereas the said commissioners by an Order dated July 1, 1891, made an adjustment under s. 1 of the Local Taxation (Customs and Excise) Act, 1890, and s. 32 of the Local Government Act, 1888, respecting the residue of the English share of the local taxation (Customs and Excise) duties after the application of the sum of 300,000*l.* to the purposes of police superannuation in England, and by that Order it was provided as follows:—

"The aggregate amount payable from time to time out of the local taxation account to or on behalf of the county of Glamorgan and county boroughs of Cardiff and Swansea out of the said residue of the English share of the local taxation (Customs and Excise) duties under s. 1 of the Local Taxation (Customs and Excise) Act, 1890, shall be divided into 2,718,913 equal parts, and of such equal parts there shall be paid out of the said account to the Glamorganshire County Council one million eight hundred and sixteen thousand four hundred and forty-four, to

the council of the county borough of Cardiff six hundred and thirty-two thousand five hundred and eighty-three, and to the council of the county borough of Swansea two hundred and sixty-nine thousand eight hundred and eighty-six."

And whereas the Local Government Board by an instrument dated February 2, 1909, under their seal of office declared that they were satisfied that the above-mentioned adjustments had become inequitable, and that the councils of the said county and county boroughs were unable to agree on new adjustments, and in pursuance of their powers in that behalf appointed me, the said Hugh Owen, to act as arbitrator to make a new equitable adjustment or adjustments of the financial relations between the said county of Glamorgan, the city and county borough of Cardiff, and the county borough of Swansea, which were adjusted by the above recited Orders of the Local Government Act Commissioners.

And whereas provision is made by s. 20 of the Act of 1888 as to the proceeds of the duties collected in each administrative county by the Commissioners of Inland Revenue, or by the county council, on the licences in that Act referred to as local taxation licences, and by s. 21 of the Act of 1888 as to the payment to the local taxation account of a portion of the probate duty (now the estate duty), and by that Act it is provided as follows:—

Sect. 22 (1.).—"The sums paid in pursuance of this Act to the local taxation account in respect of the proceeds of the probate duties (in this Act referred to as the 'probate duty grant'), shall, until Parliament otherwise determine, be distributed among the several counties in England and Wales in proportion to the share which the Local Government Board certify to have been received by each county during the financial year ending the thirty-first day of March next before the passing of this Act out of the grants heretofore made out of the Exchequer in aid of local rates, which will cease to be granted after the passing of this Act. . . . ."

Sect. 22 (2.).—"In the case of the six counties of South Wales . . . . there shall be added to the amount actually received out of such grants as aforesaid such additional sum as the Local Government Board certify to be the amount which each of the

C. A. 1915

GLAMORGAN COUNTY COUNCIL v. CARDIFF CITY COUNCIL AND SWANSEA BOROUGH COUNCIL.

said counties . . . . would have received, if the roads maintained by the county roads boards . . . . had been main roads."

Sect. 22 (3.).—"The proportion to be paid to each county shall from time to time be paid under the direction of the Local Government Board to the county council out of the local taxation account. . . . ."

Sect. 23 (1.).—"All sums from time to time received by a county council in respect of

"(*a*) The duties on the local taxation licences, whether collected by the Commissioners of Inland Revenue or by the county council, and

"(*b*) The probate duty grant

shall be paid to the county fund and carried to a separate account, in this Act referred to as the Exchequer contribution account."

Sect. 23 (2.)—"All sums for the time being standing to the Exchequer contribution account shall be applied

"(i.) in paying the costs incurred in respect thereof, or otherwise chargeable thereon; and

"(ii.) in payment of the sums required by this Act to be paid by the county council in substitution for local grants; and

"(iii.) in payment of the grant required by this Act to be made by the county council in respect of costs of union officers; and

"(iv.) in repaying to the general county account of the county fund the costs on account of general county purposes for which the whole of the area of the county is liable to be assessed to county contributions; and shall be so applied in the order above mentioned . . . ."

Sect. 24.—"Whereas certain grants heretofore made out of the Exchequer in aid of local rates (in this Act referred to as local grants), will by reason of the duties on the local taxation licences and the probate duty grant being by this Act made payable to local authorities, cease, it is therefore hereby enacted as follows:

"(1.) So much of any enactment as requires or authorises payment out of the Exchequer of any local grant in substitution for which the county council is required by this Act to make any payment is hereby repealed as from the thirty-first day of March next after the passing of this Act without prejudice to any right accrued before that day."

"(2.) In substitution for local grants, the council of each county shall from time to time as from the said day pay out of the county fund and charge to the Exchequer contribution account the following sums, that is to say" (the sums in that sub-section mentioned).

Sect. 26 (1.)—"After the thirty-first day of March next after the passing of this Act, every county council, other than the London County Council, shall grant to the guardians of every poor law union wholly or partly in their county an annual sum for the costs of the officers of the union and of district schools to which the union contributes; and, until Parliament otherwise determine, the said annual sum shall be such sum as the Local Government Board certify to have been expended by the guardians of each poor law union during the financial year ending the twenty-fifth day of March next before the passing of this Act, on the salaries, remuneration, and superannuation allowances of the said officers (other than teachers in poor law schools), and on drugs and medical appliances."

Sect. 31.—"Each of the boroughs named in the Third Schedule to this Act being a borough which on the first day of June, one thousand eight hundred and eighty-eight, either had a population of not less than fifty thousand or was a county of itself shall from and after the appointed day be for the purposes of this Act an administrative county of itself, and is in this Act referred to as a county borough. . . . ."

Sect. 32 (1.).—"An equitable adjustment respecting the distribution of the proceeds of the local taxation licences and probate duty grant, and respecting all other financial relations, if any, between each county and each county borough specified in the said schedule as being deemed for the purposes of this Act to be situate in that county, shall be made by agreement, within twelve months after the appointed day, between the councils of each county and each borough and in default of any such agreement, by the commissioners appointed under this Act. . . . ."

Sect. 32 (3.).—"In such adjustment regard shall be had to the existing property debts and liabilities (if any) connected with the financial relations of the county and borough, and to the

C. A. 1915

GLAMORGAN COUNTY COUNCIL v. CARDIFF CITY COUNCIL AND SWANSEA BOROUGH COUNCIL.

consideration that the county is not to be placed in any worse financial position by reason of the boroughs therein being constituted county boroughs, and that a county borough is not to be placed in a worse financial position than it would have been in if it had remained part of the county and had shared in the division of the sums received by a county in respect of the licence duties and the probate duty grant, as provided by this Act, and to the amount of benefit and value of the services which the borough receives in return for existing contributions, if any, and to all the circumstances of each case, which it appears equitable to consider. . . . ."

Sect. 34 (1.).—"The mayor, aldermen, and burgesses of each county borough acting by the council shall, subject as in this Act mentioned, have and be subject to all the powers, duties, and liabilities of a county council under this Act (in so far as they are not already in possession of or subject to the same), and in particular shall, subject to the provisions of this Act as to adjustment between counties and county boroughs, be entitled to receive the like sums out of the local taxation account, and be bound to make the like payments in substitution for local grants and the like grants in respect of the costs of the officers of unions and of district schools as in the case of a county council, so far as the circumstances make such payments applicable . . . ."

Sect. 34 (1.) (*e*).—"Any sum standing to the Exchequer contribution account of a county borough which remains after payment of the grant required to be made in respect of the costs of union officers shall be carried to the borough fund, or be applied in aid of such rate leviable over the whole of the borough as the council may determine, and the provisions respecting the payment of the same to the general county account of the county fund, and the subsequent application and division thereof, shall not apply."

And whereas with respect to the local taxation (Customs and Excise) duties the Local Taxation (Customs and Excise) Act, 1890, by s. 1, sub-s. 1, provides that "out of the English share of the local taxation (Customs and Excise) duties paid to the local taxation account on account of any financial year . . . . (*b*) the residue" (that is to say, the residue after providing for the

application of a sum of 300,000*l.* to the purposes of police superannuation in England) "shall, unless Parliament otherwise determines, be distributed between county and county borough funds, and carried to the Exchequer contribution accounts of those funds respectively, and applied under the Local Government Act, 1888, as if it were part of the English share of the local taxation probate duty. . . . ."

And whereas by s. 2 of the Education Act, 1902, it is required that the residue under s. 1 of the Local Taxation (Customs and Excise) Act, 1890, shall be applied by the local education authority to supplying or aiding the supply of education other than elementary.

And whereas the city of Cardiff and the county borough of Swansea are county boroughs included in the Third Schedule of the Local Government Act, 1888, and are for the purposes of that Act to be deemed to be situate in the county of Glamorgan.

. . . . . .

And whereas . . . . the council of the administrative county of Glamorgan having requested me to state an award in the form of a special case for the opinion of His Majesty's High Court of Justice.

Subject to the opinion of the Court on the questions hereinafter stated, I do make the following award:—

I, the said Hugh Owen, do hereby order and award as follows:

1. (*a*) That out of the aggregate proceeds of the local taxation licences and the estate duty grant which have been payable or may become payable to or on behalf of the administrative county of Glamorgan as constituted when that county as an administrative county included the county borough of Merthyr Tydvil (hereinafter referred to as the administrative county), the city of Cardiff, and the county borough of Swansea, there shall be paid in respect of the year ending on March 31, 1910, and of each year ending on each 31st day of March after March 31, 1910, to the administrative county the sum of 51,171*l.*, to the city of Cardiff the sum of 20,018*l.*, and to the county borough of Swansea the sum of 10,841*l.*

Provided that if the said aggregate proceeds of the local taxation licences and estate duty grant for the year ending March 31,

C. A. 1915

GLAMORGAN COUNTY COUNCIL v. CARDIFF CITY COUNCIL AND SWANSEA BOROUGH COUNCIL.

1910, or for any year ending on any 31st day of March after March 31, 1910, shall fall short of the total of the said sums of 51,171*l.*, 20,018*l.*, and 10,841*l.*, then the same for each year shall be divided between the administrative county, the city of Cardiff, and the county borough of Swansea in the proportion of those sums.

(*b*) That the remainder, if any, of the said aggregate proceeds of the local taxation licences and estate duty grant for the year ending on March 31, 1910, and for each year ending on each 31st day of March after March 31, 1910, shall be divided between the administrative county, the city of Cardiff, and the county borough of Swansea in the following proportions :—

The administrative county. . . .	£3,714,718
The city of Cardiff	1,140,752
The county borough of Swansea . . .	487,253

2. That the aggregate proceeds of the residue of the English share of the local taxation (Customs and Excise) duties under s. 1 (1.) (*b*) of the Local Taxation (Customs and Excise) Act, 1890, which have been payable or may become payable to or on behalf of the administrative county, the city of Cardiff, and the county borough of Swansea in respect of the year ending on March 31, 1910, and of each year ending on each 31st day of March after March 31, 1910, shall be divided between the administrative county, the city of Cardiff, and the county borough of Swansea in the same proportions as is hereinbefore provided with regard to the remainder, if any, of the aggregate proceeds of the local taxation licences and the estate duty grant.

3. That if the administrative county or the city of Cardiff or the county borough of Swansea shall have received or shall receive in respect of the proceeds of the local taxation licences and the estate duty grant and the residue of the English share of the local taxation (Customs and Excise) duties under s. 1 (1.) (*b*) of the Local Taxation (Customs and Excise) Act, 1890, for the year ending March 31, 1910, or for any year ending on any 31st day of March after March 31, 1910, a sum in excess of or less than that which under the provisions of this award is payable to or on behalf of the administrative county or the city of Cardiff or the county borough of Swansea,

for that year, the administrative county or the city of Cardiff or the county borough of Swansea, as the case may be, which shall have received an amount in excess of the sum which under those provisions is to be paid thereto for that year, shall pay to the other or others of them such sum or sums as may be necessary to make good the deficiency in their receipts, so that each of the said three areas shall have its just share according to the provisions of this award.

4. That any sum which by this award the administrative county or the city of Cardiff or the county borough of Swansea is required to pay in respect of the proceeds of the local taxation licences, the estate duty grant, and the residue of the English share of the local taxation (Customs and Excise) duties for the year ending March 31, 1910, or any year ending on any 31st day of March after March 31, 1910, shall be paid by the county council or the council of the city of Cardiff or the council of the county borough of Swansea, as the case may be, within three months from the date of this award, together with interest at the rate of three pounds five shillings per centum per annum on such sum from the 31st day of March ending the year for which such sum is payable until the sum is paid.

5. That nothing in this award shall affect the recited Orders of the commissioners under the Local Government Act, 1888, bearing date May 2, 1892, and July 1, 1891, with regard to the distribution of the aggregate proceeds of the local taxation licences and the estate duty grant and the residue of the English share of the local taxation (Customs and Excise) duties in respect of any year ending on the 31st day of March prior to April 1, 1909, and that the said Orders so far as they are inconsistent with the provisions of this award shall be deemed to have ceased to have effect after March 31, 1909.

6. That in this award, except where the context otherwise requires—(*a*) the expression "the administrative county" means the administrative county of Glamorgan as constituted when that administrative county included the county borough of Merthyr Tydvil. (*b*) The expression "county council" means the county council of the county of Glamorgan. (*c*) The expression "the council of the city of Cardiff" means the mayor,

C. A. 1915

GLAMORGAN COUNTY COUNCIL v. CARDIFF CITY COUNCIL AND SWANSEA BOROUGH COUNCIL.

aldermen, and citizens of the city and county borough of Cardiff acting by the council, and the expression "the city of Cardiff" means the county borough and city of Cardiff. (*d*) The expression "the council of the county borough of Swansea" means the mayor, aldermen, and burgesses of the county borough of Swansea, acting by the council. (*e*) The expression "local taxation licences" means the proceeds of the duties on local taxation licences payable to county councils and councils of county boroughs under ss. 20 and 34 of the Local Government Act, 1888, as varied by s. 17 of the Finance Act, 1907, s. 6 of the Finance Act, 1908, and any Order in Council under that Act, ss. 87 and 88 of the Finance (1909-10) Act, 1910, s. 18 of the Revenue Act, 1911, and any amending Act. (*f*) The expression "estate duty grant" means the probate duty grant payable to county councils and councils of county boroughs under ss. 21, 22, and 34 of the Local Government Act, 1888, as varied by s. 19 of the Finance Act, 1894, s. 17 of the Finance Act, 1907, and any amending Act. (*g*) The expression "local taxation (Customs and Excise) duties" means the Customs and Excise duties payable to county councils and councils of county boroughs under s. 1 (1.) (*b*) of the Local Taxation (Customs and Excise) Act, 1890, as varied by s. 17 of the Finance Act, 1907, s. 17 of the Revenue Act, 1911, and any amending Act.

7. That the county council, the council of the city of Cardiff, and the council of the county borough of Swansea shall respectively pay one-third of the costs, charges, and expenses of this my award, and if one of the said councils shall pay the whole or more than one-third of such costs, charges, and expenses, the other council or councils, as the case may be, shall on demand repay the council so paying in the first instance such sum or sums as shall exceed one-third of the said costs, charges, and expenses.

8. That subject to any order of His Majesty's High Court of Justice, or any order made on an appeal, as the case may be, with respect to this award, the county council, the council of the city of Cardiff, and the council of the county borough of Swansea shall respectively pay the costs properly incurred by them in relation to the matters to which this award relates.

CASE.

The facts agreed or found by me, the said Hugh Owen, are as follows:—

1. The award made by me as hereinbefore stated (and hereinafter referred to as the "said award"), by clause 1 provides for the division of the aggregate proceeds of the local taxation licences and of the estate duty grant (which has by s. 19 of the Finance Act, 1894, been substituted for the probate duty grant) in respect of the year ending on the 31st day of March, 1910, and of each succeeding year ending on the 31st day of March, between the administrative county of Glamorgan as it was constituted when the county as an administrative county included the borough of Merthyr Tydvil (hereinafter referred to as "the administrative county"), and the county borough and city of Cardiff (hereinafter referred to as the city of Cardiff), and the county borough of Swansea.

2. Under clause 1 (*a*) of the said award there is first to be paid out of those aggregate proceeds for each of the said years to or on behalf of the administrative county the sum of 51,171*l.*, the city of Cardiff the sum of 20,018*l.*, and the county borough of Swansea the sum of 10,841*l.*, or amounts proportionate to these sums in the event of the said aggregate proceeds falling short of the total of the said sums. The sums specified it has been agreed are the annual amounts which on the average of the three years ending on the 31st day of March, 1909, were under s. 23 (2.) (i.), (ii.), (iii.) and s. 34 (1.) of the Local Government Act, 1888 (hereinafter referred to as "the Act of 1888"), payable by the administrative county, the city of Cardiff, and the county borough of Swansea respectively, out of the sums standing to their Exchequer contribution accounts in priority of any other payments out of those accounts.

3. The apportionment between the administrative county, the city of Cardiff, and the county borough of Swansea of the remainder, if any, of the aggregate proceeds of the local taxation licences and the estate duty grant in respect of each of the said years after the payments under clause 1 (*a*) are made is provided for by clause 1 (*b*) of the said award. It was agreed at the hearing that if this remainder is to be divided on rateable value or

C. A. 1915

GLAMORGAN COUNTY COUNCIL v. CARDIFF CITY COUNCIL AND SWANSEA BOROUGH COUNCIL.

assessable value the division should be on rateable value. The apportionment of that remainder made by the said award is in accordance with the agreed rateable value of each of those areas in the year 1909.

4. Clause 2 of the said award provides for an apportionment of the aggregate proceeds of the local taxation (Customs and Excise) duties on the same basis as that which is provided for by clause 1 (*b*) with regard to the apportionment of the remainder of the local taxation licences and estate duty grant after the payments under clause 1 (*a*) have been made.

5. The commissioners appointed under s. 61 of the Act of 1888 (hereinafter referred to as "the commissioners") in their report to Her late Majesty Queen Victoria, which was dated August 15, 1892, and was presented to Parliament by command of Her Majesty, set forth the principles on which the adjustments made by them were based. They stated as follows: "We determined that an equitable adjustment of the distribution of the proceeds of the local taxation licences and probate duty grant between each county and the county boroughs deemed to be therein situate would be effected by giving to such several authorities in each year the annual amount received prior to the passing of the Local Government Act out of the grants discontinued after the passing of that Act." Such grants including the grants for main roads "together with the amount payable under s. 26 of the Act, and dividing the remainder in proportion to the rateable values of the county and boroughs" . . . . "We adopted for the discontinued grants the figures of the shares certified by the Local Government Board under s. 22 of the last-mentioned Act to have been received by the counties and boroughs respectively during the financial year ending the thirty-first day of March next before the passing of the Act, out of the grants theretofore made out of the Exchequer in aid of local rates which ceased to be granted after the passing of the Act; and for the grants to be made under s. 26 we adopted the figures of the sums payable by counties and county boroughs in the year ending 31st March, 1890. And, as the salaries of poor law medical officers would be included in both such grants, we deducted from the discontinued grants as above defined the amounts included therein on that behalf. For the ratio of

rateable values we adopted the figures agreed for this purpose between the respective councils, or, in default of any such agreed ratio, the figures of the poor rate valuations in force at Lady Day, 1889." . . . . "In those cases in which terms of adjustment had been settled by agreement between the parties for the distribution of the proceeds of the residue of the local taxation (Customs and Excise) duties under s. 1 (*b*) of 'The Local Taxation (Customs and Excise) Act, 1890,' we have adopted such terms, and in default of any such agreements we determined that such proceeds should be distributed between the county and borough councils in the same manner as the remainder of the proceeds of the local taxation licences and probate duty grant above referred to, viz. in the ratio of rateable values fixed for the purposes of the adjustment." It is agreed that the report of the commissioners may be referred to in the arguments.

6. The commissioners, in arriving at the sums which under the recited Order of the 2nd day of May, 1892, with regard to the local taxation licences and probate duty grant (now the estate duty grant) were to be deemed to be priority payments, included, in the case of the administrative county, 1181*l.* being the sum included in the certificate of the Local Government Board under sub-s. 1 of s. 22 of the Act of 1888 as received by the administrative county during the financial year before the passing of that Act out of the grant for main roads, and 2894*l.* being the sum included in the certificate of that Board under sub-s. 2 of s. 22 of the Act as the amount which the administrative county would have received out of the said grant if the roads maintained by the Glamorganshire County Roads Board had been main roads. In the cases of the city of Cardiff and the county borough of Swansea no sum in respect of grants out of the Exchequer for roads was taken into account by the commissioners in determining the priority payments, as no such grants were made to those boroughs in the year ending on the 31st day of March, 1888. In the case of the county borough of Swansea the commissioners took into account in determining the priority payments a sum of 392*l.*, that being the amount included in the certificate of the Local Government Board under sub-s. 2 of s. 22 of the Act of 1888 as the sum which the county borough would have received if the roads

C.A. 1915

GLAMORGAN COUNTY COUNCIL v. CARDIFF CITY COUNCIL AND SWANSEA BOROUGH COUNCIL.

maintained by the Glamorganshire County Roads Board had been main roads. In the city of Cardiff there were no roads maintained by the said county roads board, as by s. 22 of the Cardiff Improvement Act, 1875, it was provided that "from and after the thirty-first day of December, 1875, no tolls shall be collected on any road within the limits of the borough and the several turnpike roads within the same shall cease to be turnpike roads and all liability on the part of the Glamorganshire County Roads Board with regard to the said roads and the maintenance and repair thereof except as hereinafter mentioned shall cease and determine and the said roads shall thenceforth be highways and be vested in and maintained and repaired by the corporation provided that forthwith after the thirty-first day of December, 1875, the said county roads board shall at their own cost remove all the tollgates, bars, and posts on or across such roads, the corporation paying to the said board the sum of 150*l.* as a contribution towards such removal."

7. In the case of the city of Cardiff the commissioners made an order dated the 29th day of March, 1892, by which it was ordered (inter alia) as follows: "There shall be forthwith paid by the council of the county borough of Cardiff to the Glamorgan County Council the capital sum of five thousand seven hundred and one pounds eleven shillings and threepence with interest thereon after the rate of three pounds five shillings per centum per annum from the first day of January, one thousand eight hundred and ninety-two, up to the day of payment, in full discharge of every existing and future liability of the borough to contribute or to incur expense in respect of the undermentioned heads of county expenditure, that is to say: General purposes, salaries of officers, county buildings and printing, save as hereinunder provided, county bridges, main roads, registration of parliamentary voters, and burial of corpses." In the case of the county borough of Swansea an Order bearing the same date as the recited Order of May 2, 1892, was made by the commissioners, which contained a provision with regard to that county borough similar to that in the said Order of March 29, 1892, with regard to the county borough of Cardiff, the council of the county borough of Swansea being required forthwith to

pay to the Glamorgan County Council the principal sum of 1365*l.* 2*s.* 3*d.*, with interest thereon after the rate of 3*l.* 5*s.* per centum per annum from January 1, 1892, up to the day of payment, in full discharge of every existing and future liability of the borough to contribute or to incur expense in respect of county expenditure relating (inter alia) to main roads.

8. Prior to the Act of 1888 coming into force it devolved on the justices of the county of Glamorgan in quarter sessions assembled, under s. 96 of the South Wales Turnpike Trusts Act, 1844 (7 & 8 Vict. c. 91), to raise the county road rate required for providing the amount in each year which the Glamorganshire County Roads Board, after comparing the estimated receipts and expenditure for the county of Glamorgan in respect of turnpike roads, certified in pursuance of s. 95 of the said Act to be necessary in addition to the county roads fund, that being the fund to which it was provided by s. 94 of the said Act the tolls collected on turnpike roads in the county should be carried. The boroughs of Cardiff and Swansea contributed to the rates levied for this purpose by the justices of the county of Glamorgan until the Local Government Act, 1888, come into operation, when those boroughs were constituted county boroughs, and by operation of s. 13 of that Act the county roads board ceased to exist and the roads maintained and repaired by that board became main roads within the meaning of the Highways and Locomotives (Amendment) Act, 1878, and under sub-s. 1 of s. 11 of the Local Government Act, 1888, were to be wholly maintained and repaired by the council of the county. The county council of Glamorgan made claims before the commissioners against the county boroughs of Cardiff and Swansea respectively, in respect of the loss by the administrative county of Glamorgan of the contribution of those county boroughs towards the cost of (inter alia) the said roads, and I find that the sum which by the said Order of March 29, 1892, the commissioners ordered should be paid by the county borough of Cardiff to the county council of Glamorgan, and the sum which by the said Order of May 2, 1892, the commissioners ordered should be paid by the county borough of Swansea to the said county council, so far as those sums had reference to main roads, were awarded as compensation for the

C. A. 1915

GLAMORGAN COUNTY COUNCIL v. CARDIFF CITY COUNCIL AND SWANSEA BOROUGH COUNCIL.

loss of the contributions of those county boroughs towards the cost of the said roads, and that the sums so ordered by the commissioners to be paid by the county boroughs of Cardiff and Swansea to the county council had no relation to the adjustments required to be made by the commissioners as to the distribution of the proceeds of the local taxation licences and estate duty grant.

9. The priority payments in respect of the local taxation licences and the estate duty grant under the said award would therefore be such payments as represent the average annual sums which in the three years ending on March 31, 1909, the county council, the council of the city of Cardiff, and the council of the county borough of Swansea were by s. 23 (2.) (i.), (ii.), (iii.) and s. 34 of the Local Government Act, 1888, required to pay out of the moneys standing to the credit of their Exchequer contribution accounts in priority of any other payments out of those moneys, instead of the priority payments prescribed by the recited Order of the commissioners dated May 2, 1892, which are based on the amounts received by the administrative county, the city of Cardiff, and the county borough of Swansea in the financial year ended March 31, 1888, out of the grants (other than those for the salaries of poor law medical officers) theretofore made out of the Exchequer in aid of local rates which ceased to be paid after the passing of the Local Government Act, 1888, and the amounts of the grants which were payable for the year ending on March 31, 1890, by the administrative county, the city, and the county borough under the provisions of ss. 26 and 34 of the Local Government Act, 1888, in respect of the cost of union officers, together with such additional sums as would have been received by those areas if the roads maintained by the Glamorganshire County Roads Board had been main roads. And with regard to the remainder of the proceeds of the local taxation licences and estate duty grant and the residue of the English share of the Customs and Excise duties under s. 1 (1.) (*b*) of the Local Taxation (Customs and Excise) Act, 1890, the effect of the said award would be that such remainder and residue would in the year ending on March 31, 1910, and of each succeeding year ending on March 31, be divided between the administrative

county, the city of Cardiff, and the county borough of Swansea in the proportion of their respective rateable values in the year 1909 instead of being divided as is provided by the Orders of the commissioners dated May 2, 1892, and July 1, 1891, in the proportion of their respective rateable values in the year 1889.

10. Under s. 23 (2.) of the Act of 1888 the share of the administrative county of the remainder of the proceeds of the local taxation licences and of the probate duty grant (now the estate duty grant) after the priority payments under s. 23 (2.) (i.), (ii.), (iii.) have been made is next to be applied under sub-s. 2 (iv.) of that section in repaying to the general account of the county fund the costs of general county purposes for which the whole of the area of the administrative county is liable to be assessed to county contributions, and by s. 34 (i.) of that Act the council of a county borough is bound to make the like payments in substitution for local grants, and the like grants in respect of the costs of the officers of unions and of district schools, as in the case of a county council, so far as the circumstances make such payments applicable, and any sum standing to the Exchequer contribution account of a county borough which remains after payment of the grant required to be made in respect of the cost of union officers is to be carried to the borough fund or be applied in aid of such rate leviable over the whole of the borough as the council may determine.

11. The costs of main roads are costs on account of general county purposes, for which the whole of the area of the administrative county is liable to be assessed to county contributions, and in the case of a county borough all roads within the borough (including main roads, if any, within the borough), the cost of which is chargeable over the whole borough, may be defrayed out of rates leviable over the whole of the borough. It may be inferred that it was in consequence of the enactments above referred to that no express provision is made by the Act for any part of the said costs being defrayed out of the proceeds of the local taxation licences and estate duty grant. The sum which is applicable under s. 23 (2.) (iv.) in the case of the administrative county is insufficient to meet the whole of the costs on account of general county purposes for which the whole

C. A. 1915

GLAMORGAN COUNTY COUNCIL v. CARDIFF CITY COUNCIL AND SWANSEA BOROUGH COUNCIL.

of the area of the county is liable to be assessed to county contributions, and consequently there is no residue to which sub-ss. 3, 4, 5, 6, and 7 of s. 23 can apply, and under the provision in sub-s. 1 (*e*) of s. 34, sub-ss. 3, 4, 5, 6, and 7 of s. 23 do not apply to a county borough.

12. In my opinion there is nothing in the Local Government Act, 1888, which requires that in my award I should provide for the distribution between the three councils of the aggregate proceeds of the local taxation licences and estate duty grant which are receivable by them on any other basis than that on which the figures in clause 1 of the proposed award are calculated, which basis corresponds as nearly as may be to the scheme laid down in ss. 23 and 34 of the Act for the application of the said proceeds by the councils when the proceeds have been paid into their Exchequer contribution accounts, and in my opinion the adjustment made by the said award is an equitable adjustment within the meaning of the Local Government Act, 1888.

CONTENTION OF COUNTY COUNCIL.

13. The council of the administrative county contend:

That as a matter of law in making the apportionments of the proceeds of the local taxation licences and estate duty grant there should have been taken into account, before providing for the division of the remainder of such proceeds after the payments under clause 1 (*a*) of the said award have been made, (*a*) the annual sums which on an average of years would represent in the case of the administrative county and the county borough of Swansea one-half of the cost of the maintenance of the main roads in those areas and of the roads in those areas which during the year ended March 31, 1888, were maintained by the Glamorganshire County Roads Board, or, (*b*) as an alternative, annual sums equal to the amounts estimated to have been received by the administrative county and the county borough of Swansea during the financial year ended the 31st day of March, 1888, out of the grants discontinued under the Act of 1888 in respect of main roads, together with such sums as would have been received by those areas during that year if the roads maintained by the Glamorgan County Roads Board had been

main roads as certified by the Local Government Board under s. 22 of the said Act, namely, in the case of the administrative county of Glamorgan, the sum of 4075*l.* (being the total of the two sums mentioned in paragraph 6 last aforesaid), and in the case of the county borough of Swansea the sum of 392*l.*, and in the case of the city of Cardiff nil.

14. The council of the city of Cardiff and the council of the county borough of Swansea oppose the contentions of the county council.

Questions for the Opinion of the Court.

15. The questions for the opinion of the Court are:

(1.) Whether the county council are as a matter of law right in their contention.

(2.) Whether, if the opinion of the Court on the first question is in the affirmative, in making the apportionments of the proceeds of the local taxation licences and estate duty grant there should have been taken into account before providing for the division of the remainder of such proceeds the annual sums referred to in "(*a*)" of the contentions of the county council.

(3.) Whether, if the opinion of the Court on the first question is in the affirmative, in making such apportionments there should have been taken into account before providing for the division of the remainder of such proceeds the annual sums referred to in the alternative (*b*) of the contentions of the county council.

Award.

If the opinion of the Court on the first question is in the negative, the award, hereinbefore stated to be my award subject to the opinion of the Court, shall be deemed to be my award.

If the opinion of the Court on the first and second questions is in the affirmative, the said award with the substitution in clause 1 (*a*) thereof and in the proviso in that clause of the sum of 70,816*l.* for the sum of 51,171*l.*, and of the sum of 11,785*l.* for the sum of 10,841*l.*, shall be deemed to be my award.

If the opinion of the Court on the first and third questions is in the affirmative, the said award with the substitution in clause 1 (*a*) thereof and in the proviso in that clause of the sum

C. A. 1915

of 55,246*l.* for the sum of 51,171*l.*, and of the sum of 11,233*l.* for the sum of 10,841*l.*, shall be deemed to be my award.

GLAMORGAN COUNTY COUNCIL *v.* CARDIFF CITY COUNCIL AND SWANSEA BOROUGH COUNCIL.

Sir R. Finlay, K.C. (*J. Tyldesley Jones* with him), for the Glamorgan County Council. The arbitrator in making the apportionments of the local taxation licences and estate duty was bound in law to take into account the annual sums which on an average of years would represent in the case of the administrative county of Glamorgan and the county borough of Swansea one half of the cost of the maintenance of the main roads in those areas. In doing so he would only have been following the principle laid down by the commissioners in their original apportionment, which principle he was in law bound to follow. [He cited *West Hartlepool Corporation* v. *Durham County Council.* (1)]

Macmorran, K.C., and *Bruce Thomas*, for the Swansea Borough Council, cited *Kydd* v. *Liverpool Watch Committee.* (2)

Disturnal, K.C. (*Ridsdale* with him), for the Cardiff City Council, cited *Lancashire Justices* v. *Newton-in-Makerfield Commissioners.* (3)

Sir R. Finlay, K.C., in reply, cited *Lancashire Justices* v. *Rochdale Corporation* (4); *West Riding Justices* v. *Sheffield Corporation.* (5)

Cur. adv. vult.

May 11. SWINFEN EADY L.J. read the following judgment:— This is an appeal from the judgment of Lawrence J. upon a special case stated by Sir Hugh Owen, as arbitrator appointed by the Local Government Board, to make a new equitable adjustment of the financial arrangements between the county of Glamorgan, the city and county borough of Cardiff, and the county borough of Swansea.

The previous adjustments had been made by certain Orders of the Local Government Act Commissioners, but by an instrument under the seal of office of the Local Government Board dated

(1) [1907] A. C. 246.
(2) [1907] 2 K. B. 591; [1908] A. C. 327.
(3) (1886) 11 App. Cas. 416.
(4) (1883) 8 App. Cas. 494.
(5) (1883) 8 App. Cas. 781.

February 2, 1909, it was declared that the Board was satisfied that such adjustments had become inequitable. A case for making a new equitable adjustment therefore arose under s. 32, sub-s. 6, of the Local Government Act, 1888.

The authority of the arbitrator in proceeding to make an award is the same as that of the commissioners under the Act, and s. 61, sub-ss. 7 and 8, and s. 62, sub-ss. 2, 3, and 4, deal with the authority of the commissioners and the force and effect of their award. The arbitrator has made an award of a new adjustment, and he states that in his opinion the adjustment made by such award is an equitable adjustment within the meaning of the Act of 1888.

The Glamorgan County Council dispute this, and contend that the arbitrator has gone wrong in law, as in making the apportionments of the proceeds of the local taxation licences and estate duty grant he has not taken into account the cost of maintenance of main roads in the county of Glamorgan and county borough of Swansea, and therefore has not duly observed the provisions of s. 32, sub-s. 3, of the Act of 1888.

In Cardiff there are not any main roads maintained at the expense of the county. By s. 22 of the Cardiff Improvement Act, 1875, the turnpike roads within the limits of the borough ceased to be turnpike roads, and all liability of the Glamorganshire County Roads Board for their maintenance ceased and determined, and the said roads were thenceforward highways vested in and to be maintained and repaired by the corporation.

Previous to the passing of the Act of 1888 grants were made out of the Exchequer in aid of local rates, and in fixing the amount of these contributions the moiety of the expenditure in maintaining main roads for which the counties were liable under the Highways and Locomotives Act, 1878, was taken into consideration. This Act was not applicable to the six South Wales counties, as under the Acts 7 & 8 Vict. c. 91 and 23 & 24 Vict. c. 68 the roads there were under the control of a county roads board, and a "deficiency rate" was levied, to meet the cost of maintenance, so far as the turnpike receipts were insufficient for that purpose, and in these counties the grant in aid out of the Exchequer was limited to one half of this deficiency rate.

C. A. 1915

GLAMORGAN COUNTY COUNCIL v. CARDIFF CITY COUNCIL AND SWANSEA BOROUGH COUNCIL.

Swinfen Eady L.J.

The Act of 1888, by s. 11, imposed on county councils the obligation of entirely maintaining the main roads of a county instead of the county contributing only a moiety of the cost, and by s. 13 the Act was adapted and applied to South Wales roads and the county roads boards were dissolved.

Sect. 22, sub-s. 1, provides for the distribution of the probate duty grant (now known as the estate duty grant) which is to be distributed among the several counties in England and Wales in proportion to the share which the Local Government Board certify to have been received by each county during the financial year ending March 31, 1888, out of the grants theretofore made out of the Exchequer in aid of local rates, which will cease to be granted after the passing of the Act.

Sect. 22, sub-s. 2, provides that, in the case of each of the six counties of South Wales, there shall be added to the amount actually received out of such grant such additional sum as the Local Government Board shall certify to be the amount which each of the said counties would have received if the roads maintained by the county roads board had been main roads.

Thus the share which each county receives of the estate duty grant, being dependent upon the amount which it received for the year ending March 31, 1888, out of the Exchequer in aid of local rates, and this in turn depending upon the half cost of maintaining main roads, the Glamorgan County Council contends that, in sub-dividing this share among the three administrative counties, regard must be had to the fact that the burden of the maintenance of the main roads falls upon the county, and that the borough of Cardiff does not contribute to it; that Cardiff ought not to share, because the measure of the amount of the grant in aid was not taken with reference to any expenditure by Cardiff on its roads.

In making his award the arbitrator has allotted to the county and to each of the two county boroughs the sums mentioned in s. 23, sub-s. 2, paragraphs ii. and iii., the county boroughs being bound under s. 34, sub-s. 1, to make the like payments in substitution for local grants, and the like grants in respect of the costs of the officers of unions as in the case of a county council. The surplus of the local taxation licences and estate duty grant,

after making provision for the foregoing payments, is allotted to the three administrative counties, in the proportions set out in the award, which corresponds with their respective rateable or assessable values. The Glamorgan County Council's contention is that, before thus dividing the surplus, the arbitrator was bound to make an allotment to them in respect of the old main roads grant.

There is not any express provision in the Act dealing with the main roads grant as a priority payment. But in the final report of the Local Government Commissioners, dated August 15, 1892, they stated (see Macmorran and Dill's Local Government Act, 1888, 3rd ed., p. 754) as follows: "From an inspection of the amounts received by counties and boroughs in respect of the several grants made out of the Exchequer prior to the passing of the Act it was apparent to us that if, in making the adjustment, we should take into consideration the grants mentioned in the above sections 24, 26 and 35 (5.) while neglecting the grant formerly received in respect of main roads, we should be giving to the county boroughs and taking away from the counties the grants from which respectively they had in the past derived the greatest benefit. It appeared to us that it was not the intention of the Local Government Act that any special relief received by a local area from the Exchequer grants prior to the passing of the Act should be excluded from the adjustment." Accordingly, the commissioners, in arriving at the sums which were to be deemed priority payments, included in the case of the administrative county of Glamorgan 1181*l.*, being the sum included in the certificate of the Local Government Board under s. 22, sub-s. 1, of the Act of 1888, as received by the administrative county during the financial year before the passing of that Act out of the grant for main roads, and 2894*l.*, being the sum included in the certificate of the Board under s. 22, sub-s. 2, of the Act as the amount which the administrative county would have received out of the said grant, if the roads maintained by the Glamorganshire County Roads Board had been main roads. In the Local Government (Adjustments) Act, 1913, which has no direct application to this case as it applies only to adjustments consequent on an alteration of boundaries or other change effected

C. A. 1915

GLAMORGAN COUNTY COUNCIL v. CARDIFF CITY COUNCIL AND SWANSEA BOROUGH COUNCIL.

Swinfen Eady L.J.

after the passing of the Act, this principle is recognized in Part I. (clause *c*) of the schedule.

The arbitrator has set out in paragraph 11 of the case the view which he takes of the matter and the principle upon which he has proceeded. This differs from the view taken by the Local Government Commissioners, but in my opinion the arbitrator is not restricted by the previous awards nor bound to proceed upon the lines of them. He is bound to make a new adjustment which *he* considers to be an equitable adjustment within the meaning of the Act of 1888, and is not bound to follow what other persons on a previous occasion have considered an equitable adjustment. The appellants have not shown that the award infringes the provisions of s. 32, sub-s. 3.

If the arbitrator had seen his way to make an award upon the lines contended for by the Glamorgan County Council, and had said that the adjustment thereby made was an equitable adjustment within the meaning of the Act, it may well be that such an award would have been valid and binding, but he has not done so, and I am unable to say that as matter of law he was bound to take the main road expenditure into account and make an award upon the footing contended for by the appellants.

The sums paid by Cardiff and Swansea respectively under the awards of 1892 (mentioned in paragraphs 7 and 8 of the special case) were sums awarded as compensation for the loss of the contributions of those county boroughs to the Glamorgan County Council; this was compensation in respect of another branch of the contributions to main roads, and has no relation to the adjustments required as to the distribution of the proceeds of the local taxation licences and estate duty grant.

In my opinion the appeal fails and should be dismissed.

PHILLIMORE L.J. read the following judgment:—I need not recapitulate the statement of the questions submitted to us. I will only add that Lawrence J. thought that the arbitrator was not bound as matter of law to take the half charge for maintenance of main roads into account before providing for the division of the remainder of the aggregate proceeds, and that, so far as he was bound to consider this head of the claim, the

arbitrator had sufficiently considered it. The county council of Glamorgan have appealed from this decision.

Under s. 32 of the Local Government Act, 1888, the duty of making an equitable adjustment "respecting the distribution of the proceeds of the local taxation licences and probate duty grant, and respecting all other financial relations, if any, between each county and each county borough" was to be made by the commissioners appointed under the Act, of whom the late Earl of Derby was chairman. (This Commission is often called the Derby Commission.) And then at any time after five years, if either council could satisfy the Local Government Board that the adjustment had become inequitable, an arbitrator was to be appointed who was "to make a new equitable adjustment as if he were the commissioners under this Act." The duty of the arbitrator is regulated by sub-s. 3, which, omitting parts now immaterial, provides: "In such adjustment regard shall be had to . . . . the consideration that the county is not to be placed in a worse financial position by reason of the boroughs therein being constituted county boroughs, and that a county borough is not to be placed in a worse financial position than it would have been in if it had remained part of the county and had shared in the division of the sums received by a county in respect of the licence duties and the probate duty grant, as provided by this Act, and to . . . . all the circumstances of each case which it appears equitable to consider." The use of the word "remained" is explained by the historical fact that the boroughs made county boroughs, except those which were counties corporate, had previous to this Act been as much part of the county as any rural and unincorporated area, and that provision is made in the Act for the creation of further county boroughs and their removal out of the counties, as in the case of Merthyr Tydvil. The arbitrator is therefore to contemplate what would have happened if the county borough had not been created and so removed from the county or shire.

Take the case of Swansea, which, though an incorporated borough, was not a quarter sessions borough, and did not become so till several years after the passing of the Act. If Swansea had remained a part of the county or shire, the ratepayers in it

C. A. 1915

GLAMORGAN COUNTY COUNCIL v. CARDIFF CITY COUNCIL AND SWANSEA BOROUGH COUNCIL.

Phillimore L.J.

would have contributed to the county rate in proportion to the rateable value of their property, just like any ratepayer in the rest of the county of Glamorgan, and the area occupied by the borough and the inhabitants thereof would have the same rights to what I may call "county services" as any other part of the county. In particular, if there were main roads, they would be entitled to have them kept up by the county out of the county rate. And if there were roads that were not—but ought to be—main roads, they would have the same opportunity as the inhabitants of any other highway district in the county to procure that they be made main roads.

The Derby Commission apparently interpreted the statutory directions in the following way. First of all, they took for a guide the charges which would have to be paid by the council of the shire and the council of the county borough out of their funds, charges payable over to other bodies, that is, those under s. 24, in lieu of direct local grants hitherto made by the Exchequer, and those under s. 26 for the cost of union officers. These are under s. 23, sub-s. 2 (i.), (ii.), (iii.), and the corresponding section for county boroughs, s. 34, priority payments; and they awarded in Glamorgan, as in other counties, to each of the several bodies the sums, as nearly as they could be ascertained at the time, which would have been so paid over.

The arbitrator has followed them in this respect. After these priority payments have been made, s. 23 (iv.) directs that the balance of the Exchequer contributions shall be applied "in repaying to the general county account of the county fund the costs on account of general county purposes, for which the whole of the area of the county is liable to be assessed to county contributions." And s. 34 makes a similar provision in the case of county boroughs. If as between shire and county borough these were all the special items to be considered, a reasonable way of dividing the balance would be to take the rateable value of the two areas and divide the residue in proportion. This is what, after making one further deduction, the commissioners did, and what, without making this further deduction, the arbitrator has done.

In this connection the county of Glamorgan, which claims

that the arbitrator should have followed the commissioners, relied for an argument on those provisions of s. 23 which follow on (iv.), and this takes us to the Highways and Locomotives (Amendment) Act, 1878. Under this Act, for the first time, county main roads, being originally disturnpiked roads, were established and directed to be maintained out of the county rates (s. 13), but no road within the area of a quarter sessions borough was to be a main road. So that the ratepayers in a quarter sessions borough, while having to contribute towards the repairs of main roads, did not get relief in respect of any road within the borough. It happens that the six counties of South Wales were excluded from this Act, having been provided for by special legislation; but this becomes immaterial, because s. 13 of the Local Government Act, 1888, brings them into line with the other counties of England and Wales. In relief of this expenditure on main roads, Parliament had for several years made an annual grant to the counties, speaking generally, of half the cost, with a special provision in the case of South Wales. That grant ceased on the passing of the Act of 1888.

There is some reason (it was said) for supposing that the share of the probate duty granted under the Act of 1888 was intended to be in lieu of the half cost, as this share of duty is directed by s. 22 to be distributed between the counties, meaning by that the shires, in the same proportion which the several grants for half cost bore to each other in the year before the passing of the Act in 1888, with a special provision as regards the six counties of South Wales and the Isle of Wight.

To the extent therefore to which the new probate duty grant might be considered as the lineal successor of the half cost grant, if there had to be any distribution between the rural parts of a county and a quarter sessions borough, it might be equitable to give a larger share to the rural parts; and if a county borough was a quarter sessions borough, or was to be considered as being in the same position as a quarter sessions borough, to this extent, though apparently no further, the preference might similarly be given to the shire over the county borough before proceeding to a final distribution according to rateable values.

The argument for the county of Glamorgan then proceeded to

C. A. 1915

GLAMORGAN COUNTY COUNCIL v. CARDIFF CITY COUNCIL AND SWANSEA BOROUGH COUNCIL.

Phillimore L.J.

dwell upon the further distributions under s. 23, which follow after the figure (iv.) and which are, roughly, that any surplus after repaying costs on account of general county purposes is to be applied, first, in dividing as between quarter sessions boroughs and the rest of the county proportionate shares of their special expenditure, and then according to rateable value: so that the claim of the general county fund, which would include repair of main roads, is charged under (iv.) before the quarter sessions borough gets any advantage, and the quarter sessions borough could still pay its proportion of expenses of the main roads in the county.

One answer to this line of argument may be derived from s. 35, sub-s. iv., which puts quarter sessions boroughs in the same position as other areas, and allows a quarter sessions borough to claim to have roads within it made main roads, with an appeal to the Local Government Board if the county council refuse.

Though, as it happens, some of the county boroughs were not quarter sessions boroughs, most of them probably were, and the Derby Commissioners in declaring their general policy seem to have treated them all as if they were, or would shortly be made, quarter sessions boroughs, and as therefore having no main roads within their limits, though they might under the section just mentioned, if they had remained in the county, be able to get certain roads declared main roads. And by their report, dated August 15, 1862, which is to be found among the parliamentary papers and as an appendix to Macmorran and Dill on Local Government, the commissioners, after stating that there was a "difficulty in ascertaining the precise position of a county borough, had it remained part of the county," and referring to the payments hitherto made, including those "on account of main roads," proceed as follows: "By s. 11 (1.) the whole cost of the maintenance of the main roads in the borough would have been defrayed by the county council as a general county purpose, and under s. 35 (4.) (*b*) the borough council might have been able to obtain from the county council or from the Local Government Board a declaration that some of the roads within the borough were main roads. We are of opinion that an attempt to determine by a number of special

inquiries what roads within the county boroughs would have been declared main roads, had such boroughs remained parts of the counties in which for the purposes of the Local Government Act they were respectively deemed to be situate, and what additional roads within the county area would also have been declared main roads, and to appraise the annual cost of maintenance of such roads, would have caused great delay and expense, and could have produced no satisfactory result. On the other hand, from an inspection of the amounts received by counties and boroughs in respect of the several grants made out of the Exchequer prior to the passing of the Act it was apparent to us that if, in making the adjustment, we should take into consideration the grants mentioned in the above-mentioned sections 24, 26 and 35 (5.), while neglecting the grant formerly received in respect of main roads, we should be giving to the county boroughs and taking away from the counties the grants from which respectively they had in the past derived the greatest benefit."

And their award as between Glamorgan, Cardiff, and Swansea, it is agreed, proceeded upon the footing that Cardiff, whose special legislative position will require further notice, had no main roads ; that Swansea had a very small mileage, and that Glamorgan had a considerable mileage, and apportioned, after payment of priority charges, sums equivalent to the half cost of the Swansea roads to Swansea, and of the Glamorgan roads to Glamorgan, before dividing the surplus in accordance with the rateable value. By a separate award they directed that Cardiff and Swansea should respectively pay a lump sum to Glamorgan in respect of cesser of their liability to contribute to the county for certain purposes, including main roads.

The Derby Commissioners seem to recognize that their principle of distribution is not ideal. To put the county boroughs and the shire on a level, the county boroughs ought notionally at any rate to have been allowed a share for their main roads. But apparently the commissioners thought that it was not worth while going to the trouble and expense of determining for this purpose only, as it would be for no other purpose, what ought to be main roads.

C. A. 1915

GLAMORGAN COUNTY COUNCIL v. CARDIFF CITY COUNCIL AND SWANSEA BOROUGH COUNCIL.

Phillimore L.J.

Then, as between the two extreme methods of distribution, they elected one which they thought fairer than the other, neither being so fair as the ideal one. They were not unnaturally taking things as they found them, and they did not know that it might be the policy of county councils largely to extend the number of their main roads. Many county councils have pursued this policy; whether that of Glamorgan has done so to the extent to which Notts and Herts have done, I do not know, but the difference between the alternative award A and the alternative award B shows how largely the mileage or the expense of main roads in Glamorgan has increased. Counsel for Glamorgan contended for the larger figure.

The Derby Commissioners adjudicated without appeal and, no doubt, with great wisdom; but one may respectfully comment upon their award, and I do not see that as a matter of law a subsequent arbitrator is bound to follow it. His duties are to make that which he considers an equitable adjustment. In support of the comparative correctness of his adjustment I suggest that, even supposing that it would be right to treat the probate duty grant as the lineal successor of the old grant of half cost, the local taxation licences were in no sense successors of the half cost, and it might be that half the expense of main roads would more than exhaust the estate duty grant.

I am unable to see anything in the facts stated by the arbitrator in the case which makes it inequitable to award as he proposes. He may take the view that he has nothing to do with the incidence of past grants; that all he has to look to is the comparative financial position in the future of the shire with the county borough in it and the shire without it, and conversely of the county borough in the shire and the county borough standing alone. In the first case the local taxation licences and the share of the estate duty grant would be applied under (iv.) to general county purposes which would include main roads in the borough as well as those in the county, and if the number of these were to be much increased in the county they should in equity (as he might well think) be proportionately increased in the borough and the charge for both would be on the county funds. In the

second case one would maintain its main roads out of the county fund and the other its corresponding roads out of the borough fund. And on the whole it might be the most equitable course to make the grants to the two funds according to rateable value. If not the most equitable, it might be more equitable than a distribution which allowed the county to increase by its own act the share which would come to it.

There remain two further topics to be considered. Counsel for Glamorgan placed great reliance on the Local Government Adjustments Act, 1913, and on a rule in the First Schedule (1 *c*). I think there are two answers. (1.) It is a rule for cases in futuro providing for making a short cut in matters of adjustment and saving discussion and litigation. It is an arbitrary measure of division. (2.) Though it may apply, amongst others, to readjustment of boundaries between shires and county boroughs, it provides more especially for adjustments between areas, each of which has main roads. I suspect that no county borough has its area enlarged except under the provisions of a special Act of Parliament which would provide its own measure.

The other topic relates to the special position of Cardiff. The roads in South Wales were till 1888 subject to special legislation. In this state of things, by s. 22 of the Cardiff Improvement Act, 1875, no tolls were to be collected on any road within the limits of the borough, the turnpike roads were to cease to be turnpike roads, the county roads board was no longer to be responsible for their maintenance, and they were henceforth to be vested in and repaired by the corporation. I do not think this makes any difference. There is nothing in this section which would have prevented Cardiff, if it had remained within Glamorgan, from applying after 1888 to have fitting roads within its area made main roads, and if it became—as it did—a quarter sessions borough, from enforcing its application by appeal to the Local Government Board. According to the policy of the Highways Act of 1878, prima facie all turnpike roads are suitable to be made main roads.

Upon the whole, I think that the judgment of Lawrence J. was right and should be affirmed.

C. A. 1915

GLAMORGAN COUNTY COUNCIL v. CARDIFF CITY COUNCIL AND SWANSEA BOROUGH COUNCIL.

BANKES L.J. read the following judgment:—This is an appeal from the judgment of Lawrence J. in a special case stated by an arbitrator.

The point raised is whether as a matter of law the arbitrator was bound to take into consideration certain matters set out under two headings (*a*) and (*b*) in paragraph 13 of the special case. Upon the argument before this Court, Sir R. B. Finlay, K.C., for the appellants did not insist upon the contention under head (*b*), and the only matter therefore which remains for consideration is whether the arbitrator was or was not wrong in law in refusing to accede to the contention under head (*a*).

The Local Government Act, 1888, created certain county boroughs. Included in the number were Cardiff and Swansea. Sect. 32 of that Act provided for an equitable adjustment of financial relations between counties and county boroughs, which in default of agreement was to be made by commissioners appointed under the Act. Commissioners were appointed; and three Orders were made by them relating to the county of Glamorgan, the city of Cardiff, and the county borough of Swansea respectively.

Sect. 32 required two adjustments to be made; one respecting the distribution of the proceeds of the local taxation licences and probate duty, and the other of all financial relations, if any, between each county and county borough; and the section directed that the adjustment should provide, in the case of any expenses which might in future be incurred by the county wholly or partly on behalf of the borough, for the liability of the borough to contribute; and, except as otherwise provided, the section also directed that any existing liability to contribute, or to incur expense, should cease after the appointed day, and that an equitable provision for such cessation should be made in the adjustment.

The commissioners dealt separately with the two adjustments, and made separate Orders with regard to them. The Orders relating to financial relations, other than the distribution of the local taxation licences and probate duty grant, are dated March 29, 1892, in the case of Cardiff, and May 2, 1892, in

the case of Swansea; and in each case the commissioners made an order for the payment by the county borough of a sum of money to the Glamorgan County Council, which was stated to be in each case in full discharge of every existing and future liability of the borough to contribute or to incur expense in respect of certain mentioned heads of expense, which included main roads. The considerations which led the commissioners to make the above Orders, and the principles upon which they were based, appear in the final report of the commissioners in passages set out on pp. 755, 756, and 757 of Macmorran and Dill on the Local Government Act, 3rd edition. The way in which the amounts are arrived at are set out in the schedule headed "Capital Account" in each Order. By his award (paragraph 8) the arbitrator finds that the sums so ordered to be paid had no relation to the adjustments required to be made by the commissioners as to the distribution of the proceeds of the local taxation licences and estate duty grant. No argument was addressed to this Court on this finding; so, without expressing any opinion on the question, my judgment proceeds on the footing that the Orders I have already referred to have no bearing upon the point which the Court is asked to decide.

The Order of the commissioners which dealt with the distribution of the proceeds of local taxation licences and probate duty grant is dated May 2, 1892. It deals both with Cardiff and with Swansea, and it provides by art. II. as follows: "Out of the aggregate proceeds of the local taxation licences and probate duty grant, payable out of the local taxation account, under ss. 20 and 22 of the Local Government Act, in respect of the financial year ended March 31, 1892, and of each succeeding financial year, to or on behalf of the county of Glamorgan and county boroughs of Cardiff and Swansea, there shall be paid from the said account to the Glamorganshire County Council and to the councils of the said county boroughs the sums severally next hereunder stated against the name of the county and of each such county borough; or, if the said aggregate proceeds shall in any year fall short of the total of the sums mentioned, then the same shall be divided between the said county and borough councils in the proportion of such

C. A. 1915

GLAMORGAN COUNTY COUNCIL v. CARDIFF CITY COUNCIL AND SWANSEA BOROUGH COUNCIL.

Bankes L.J.

sums, viz.: county of Glamorgan, 34,616*l.*; county borough of Cardiff, 11,760*l.*; county borough of Swansea, 8526*l.*; total, 54,902*l.* The remainder, if any, of the said aggregate proceeds shall in each year be divided and paid from the said account to the said county and borough councils in proportion to the sums severally hereunder stated against the name of the county and of each county borough, viz.: county of Glamorgan, 1,816,444; county borough of Cardiff, 632,583; county borough of Swansea, 269,886."

Sect. 32, sub-s. 3, of the Local Government Act, 1888, laid down the principles which were to guide the commissioners in making the adjustment: "In such adjustment regard shall be had to the existing property, debts, and liabilities (if any) connected with the financial relations of the county and borough, and to the consideration that the county is not to be placed in any worse financial position by reason of the boroughs therein being constituted county boroughs, and that a county borough is not to be placed in a worse financial position than it would have been in if it had remained part of the county and had shared in the division of the sums received by a county in respect of the licence duties and the probate duty grant as provided by this Act, and to the amount of benefit and value of the services which the borough receives in return for existing contributions, (if any), and to all the circumstances of each case which it appears equitable to consider . . . ."

In order to apply the rule here laid down the commissioners in the first instance, or an arbitrator on any reconsideration of the original adjustment, would have to consider and possibly to contrast the condition of things as they existed prior to the date of any borough becoming a county borough with the condition of things as they existed at the date when the borough was created a county borough, or as they might have become had the borough remained a part of the administrative county. This must necessarily in many cases be a very speculative inquiry, and particularly so with regard to the cost of main roads. Neither Cardiff nor Swansea was at the date of coming into operation of the Local Government Act, 1888, a quarter sessions borough; and what had been county board roads in

Cardiff had been taken over by the corporation of Cardiff under a private Act of the year 1875. On becoming quarter sessions boroughs Cardiff and Swansea, had they not been made county boroughs, would have become entitled to the benefit of s. 35, sub-ss. 3 and 4 (*c*), of the Act of 1888, and Swansea and to some extent Cardiff might have compelled the county council to contribute to the upkeep of a portion of their roads. A similar point was considered by the commissioners, as appears in their final report on p. 753 of Macmorran and Dill; and for reasons which they give they state that in their opinion any attempt to make any forecast on this point would have produced no satisfactory result. In the final adjustment respecting the distribution of the proceeds of the local taxation licences and probate duty grant what the commissioners did, so far as the cost of main roads was concerned, is set out in paragraph 5 of the special case. They gave to each county and county borough the annual amount received by it prior to the passing of the Local Government Act, 1888, out of the grants discontinued after the passing of that Act before dividing the remainder in proportion to the rateable values of the county and boroughs. These amounts included half the cost of main roads. The final adjustment of the figures is set out on p. 2 of the special case, and the figures included a payment of 4075*l.* to the administrative county, 392*l.* to the county borough of Swansea, and nothing to the city of Cardiff in respect of the cost of main roads. These payments appear in paragraph 6 of the special case.

Sect. 32, sub-s. 6, of the Local Government Act, 1888, provides that if after the end of five years from the date of the adjustment Order the Local Government Board is satisfied on the application of the council of either a county or a borough that the adjustment has become inequitable the Board may appoint an arbitrator, and the section goes on to say that such arbitrator shall proceed to make a new equitable adjustment, as if he were the commissioners under the Act. In the present case it was the Glamorgan County Council who made the application to the Local Government Board; and it was upon their application that the Local Government Board appointed the arbitrator who stated the special case which is now before the Court.

C. A. 1915

GLAMORGAN COUNTY COUNCIL v. CARDIFF CITY COUNCIL AND SWANSEA BOROUGH COUNCIL.

Bankes L.J.

The special case takes the form of an alternative award; the arbitrator first of all states his own view in the form of an award giving the figures as he considers they ought to stand; and then, after stating the material facts and the contention of law, he states what the figures would be if the contention is allowed.

Whichever view of the award is taken, the figures show a very material alteration from those in the Order of the commissioners. No complaint is made with regard to the decision of the arbitrator except on the one point that the arbitrator has refused to allow the original sum of 4075*l.*, or any sum at all, as a priority payment in respect of the obligation of the Glamorgan County Council to maintain the main roads of the county.

The contention of the county council, as stated in the special case, is that the arbitrator is bound as a matter of law to take into account (which I understand as meaning to allow as a priority payment) the annual sums which on an average of years would represent in the case of the administrative county and the county borough of Swansea one half of the cost of the maintenance of the main roads in those areas and of the roads in those areas which during the year ended March 31, 1888, were maintained by the Glamorganshire County Roads Board.

I cannot see any ground for the form the contention takes, unless it be a contention, in effect, that though the arbitrator could vary figures he was not entitled to depart from the principle upon which the commissioners stated in their final report that they had arrived at the decision embodied in their Order.

The arbitrator derives his jurisdiction from s. 32, sub-s. 6, of the Act of 1888. In my opinion the section contemplates that something must have occurred since the making of the Order which has rendered the adjustment inequitable—the occurrence of that something is a condition precedent to the appointment of an arbitrator by the Local Government Board. In the present case the great increase of population in the different areas was in itself sufficient to give the Board the necessary jurisdiction. When appointed the arbitrator is directed to make a new equitable adjustment as if he were the commissioners under the Act. Sect. 61, sub-s. 7, gave the commissioners an absolute

discretion to settle and determine matters referred to them on such terms and in such manner as they thought most just and fit. The arbitrator has therefore a very wide discretion as to what he considers equitable—and in only two directions, so far as I can see, can his discretion be controlled. In the first place he could not override or overrule any actual decision of the commissioners, contained in any Order made by them—as, for instance, he could not direct that the boroughs should contribute more towards the upkeep of the main roads in the county than the amount which the commissioners had directed them to pay to cover all future liability; nor could he direct the county authority to repay any portion of the sum so paid. The second ground upon which the arbitrator's discretion could be controlled would be if it could be shown that he had paid no attention to the directions of s. 32, sub-s. 3, of the Act of 1888 which required him to have regard to the consideration that the county is not to be placed by his adjustment in any worse financial position by reason of the boroughs being constituted county boroughs.

The argument before this Court has been confined to this second ground only. It is said that the arbitrator has not taken the same view of what is equitable as the commissioners did in reference to a priority payment in respect to the cost of the upkeep of main roads. This is quite true; indeed, I think it is not disputed; but it is said, and I think correctly said, that on a mere question of what is equitable between the parties, the arbitrator is quite entitled to act upon his own view, even though it does not agree with that taken by the commissioners.

It is also said that the share of the sums paid to the local taxation account and divisible among the several counties in the proportion indicated by s. 22 of the Act of 1888 is arrived at by a consideration of (amongst other things) what was paid prior to that Act to each county as representing half the cost of its main roads. This is no doubt true also, but in my opinion it has no real bearing upon the question which the arbitrator had to consider. After the passing of the Act the amount of grants in aid of local rates afforded by the local taxation licences and the

C. A. 1915

GLAMORGAN COUNTY COUNCIL v. CARDIFF CITY COUNCIL AND SWANSEA BOROUGH COUNCIL.

Bankes L.J.

probate duty grant was no longer measured by the cost of the maintenance of the main roads, and the extent to which the county authorities had been relieved of the burthen of maintaining main roads out of the Exchequer grants in aid is only introduced as a convenient method of distributing the new grant in aid amongst the various counties.

No doubt this principle of division recognizes that the money will be applied, partly at any rate, in maintaining main roads; but this carries the matter no further than the express provisions of s. 23, sub-s. 2 (iv.), of the Act of 1888 do. Another point made was that the arbitrator in arriving at his award followed s. 23 down to and including sub-s. 2 (iii.), and that he was wrong in refusing to follow the direction contained in sub-division (iv.), which, if followed, would have given the county council more than it is now contending for. I do not agree with this argument. The arbitrator points out that he followed the directions of the section as far as he did because they afforded him the simplest method of adopting the principles laid down by the commissioners; and that he adopted those principles so far as he agreed with them; but on the question of any priority payment in respect of the cost of main roads he does not agree with them, and consequently he stopped short of making any similar allowance to that made by the commissioners and represented by the sum of 4075*l*. It is not necessary to say whether I agree with his reasoning; that is not the point which this Court has to decide.

The special case does not suggest that any attempt was made to satisfy the arbitrator by evidence that, unless the contention of the Glamorgan County Council was accepted, the position of the administrative county was from a financial point of view a worse one than it would have been had Cardiff and Swansea not been made county boroughs; judging by the form of the special case the arbitrator appears to have given full consideration to the arguments addressed to him, and which presumably are the same as those addressed to this Court, and upon those arguments and the facts stated in the special case I cannot find any ground for saying that the contention of the county council is right in law, or that the arbitrator was not entitled to take the view he

did as to what under all the circumstances was an equitable adjustment between the parties. I agree that the appeal should be dismissed.

C. A. 1915

GLAMORGAN COUNTY COUNCIL v. CARDIFF CITY COUNCIL AND SWANSEA BOROUGH COUNCIL.

Appeal dismissed.

Solicitors for Glamorgan County Council: *J. N. Mason & Co., for Longmore, Sworder & Longmore, Hertford.*

Solicitors for Swansea Borough Council: *Sharpe, Pritchard & Co., for H. Lang Coath, Swansea.*

Solicitors for Cardiff City Council: *Smith, Rundell & Dods, for J. L. Wheatley, Cardiff.*

W. J. B.

CANNON *v.* JEFFORD.

1915

June 9, 11.

Motor Car—Brakes—Motor Car propelled by Steam exceeding Two Tons in Weight unladen — "Two independent brakes" — Reversible Engine — Band Brake acting upon Fly Wheel of Engine—Machinery common to Band Brake and Engine—Motor Cars (Use and Construction) Order, 1904 *—Motor Cars (Use and Construction) Amendment Order*, 1911 — *Motor Cars (Use and Construction) Amendment Order*, 1913—*Locomotives on Highways Act*, 1896 (59 & 60 *Vict. c.* 36), *s.* 7.

By the Motor Cars (Use and Construction) Order, 1904, as amended by the Motor Cars (Use and Construction) Order, 1911, no person shall cause a motor car to be used on any highway unless the motor car shall have two independent brakes.

By the Motor Cars (Use and Construction) Order, 1913, in the case of a motor car propelled by steam and which exceeds two tons in weight unladen "the engine of that motor car, if it be capable of being reversed, shall be deemed to be the second independent brake."

By s. 7 of the Locomotives on Highways Act, 1896, a breach of any by-law made under the Act is, on summary conviction, punishable by a fine.

The appellant caused a steam motor car which exceeded two tons in weight unladen and had a reversible engine to be used on a highway. The only efficient brake other than the reversible engine was applied by means of a band which was brought to bear upon the periphery of the fly wheel of the engine, the braking power being transmitted from the fly wheel through the piston crank shaft and driving chain of the car to the back axle, and when the engine was out of gear, or if there happened to be a breakage of any of the machinery common to the fly wheel brake and the engine, the fly wheel brake could not operate as a brake nor could the engine be reversed so as to

1915

CANNON v. JEFFORD.

operate as a brake. The appellant having been convicted of causing the motor car to be used on the highway without having a brake independent of the engine :—

Held, that the conviction was right inasmuch as the motor car did not have two independent brakes within the meaning of the Orders; for if anything went wrong with one brake the other would be put out of action. The Orders required that there should be two independent brakes in the sense that one should work notwithstanding that the other could not, and that each should be able to work regardless of the other.

CASE stated by justices for the county of Kent.

1. An information was preferred by the respondent Charles Jefford against the appellant Herbert Cannon under s. 7 of the Locomotives on Highways Act, 1896, for a breach of the regulations made by the Local Government Board under the Act, for that he on August 25, 1914, at the parish of Crayford within the county aforesaid, unlawfully did cause a motor car which was propelled by steam and exceeded two tons in weight unladen to be used on the highway called High Street, without having a brake in good working order and of such efficiency that the application of it would cause two of its wheels on the same axle to be so held that the wheels would be effectually prevented from revolving, contrary to the Motor Cars (Use and Construction) Amendment Order, 1913, and the Motor Cars (Use and Construction) Orders, 1904 to 1912. (1) The

(1) By art. II. of the Motor Cars (Use and Construction) Order, 1904 (hereinafter referred to as "the Order of 1904"), as amended by the Motor Cars (Use and Construction) Amendment Order, 1911, it is provided that no person shall cause or permit a motor car to be used on any highway, or shall drive or have charge of a motor car when so used, unless the conditions thereinafter set forth are satisfied, including the condition that—

"(4.) The motor car shall have two independent brakes in good working order, and of such efficiency that the application of either to the motor car shall cause two of its wheels on the same axle to be so held that the wheels shall be effectually prevented from revolving, or shall have the same effect in stopping the motor car as if such wheels were so held :

"Provided that in the case of a motor car having less than four wheels this condition shall apply as if, instead of two wheels on the same axle, one wheel was therein referred to."

justices convicted the appellant "for that he unlawfully did cause a motor car which was propelled by steam and exceeded two tons in weight unladen to be used on the highway called High Street, without having a brake independent of the engine in good working order and of such efficiency that the application of it would cause two of its wheels on the same axle to be so held that the wheels would be effectually prevented from revolving, contrary to the Motor Cars (Use and Construction) Amendment Order, 1913, and the Motor Cars (Use and Construction) Orders, 1904 to 1912, and contrary to the form of the statute in such case made and provided."

2. Upon the hearing of the information the following facts were either proved or admitted by both parties :—

(*a*) On August 25, 1914, the appellant caused a motor car to be used on the public highway in High Street, Crayford.

(*b*) The motor car, consisting of an engine and wagon forming one vehicle and used for carrying goods, was propelled by steam, its weight unladen exceeded two tons, and on the day in question the motor car was being driven by a workman of the appellant along the highway through the parish of Crayford, and whilst descending Crayford Hill the speed of the motor car increased to such an extent that a serious accident resulted.

By art. I. of the Motor Cars (Use and Construction) Amendment Order, 1913 (dated April 19, 1913), "Article II. of the Order of 1904 as amended as aforesaid shall have effect as if to condition (4.) of that article there were added the following paragraph, that is to say :—

"Provided also that in the case of a motor car which is propelled by steam and which—

"(*a*) exceeds two tons in weight unladen; and

"(*b*) has one brake in good working order, and of such efficiency that the application of that brake to the motor car shall cause two of its wheels on the same axle to be so held that the wheels shall be effectually prevented from revolving;

. . . . .

the engine of that motor car, if it be capable of being reversed, shall be deemed to be the second independent brake required by this condition."

By s. 7 of the Locomotives on Highways Act, 1896 (59 & 60 Vict. c. 36), "A breach of any byelaw or regulation made under this Act . . . . may, on summary conviction, be punished by a fine not exceeding ten pounds."

1915

CANNON v. JEFFORD.

(*c*) The engine of the motor car was capable of being reversed.

(*d*) The only other brakes on the motor car were (1.) a brake acting on the rear axle of the car, and (2.) a brake acting upon the fly wheel of the engine.

(*e*) The brake No. 1 above referred to was a band brake which gripped a metal disc fixed on to the rear axle of the motor car and was operated from the cab of the engine, but which owing to the fact that the axle was fitted with differential gear did not operate so as to cause both wheels of the axle to be so held that the wheels would be effectually prevented from revolving nor had it the same effect in stopping the motor car as if those wheels were so held. It was admitted by the appellant that this brake was not of such efficiency as to comply with the requirements of the Motor Cars (Use and Construction) Orders, 1904 to 1913.

(*f*) The brake No. 2 above referred to was applied by means of a band which was brought to bear upon the periphery of the fly wheel of the engine, the braking power being transmitted from the fly wheel through the piston crank shaft and driving chain of the car to the back axle, and the two wheels on that axle were so held that they were effectually prevented from revolving.

(*g*) The No. 2 brake was in good working order.

(*h*) The two wheels on the back axle could be effectually prevented from revolving in two ways, namely, by the reversal of the engine, or by the application of the fly wheel brake.

(*i*) The fly wheel was part of the engine of the motor car, the braking action of the fly wheel brake being communicated to the rear axle through the same parts of the engine, i.e., the piston crank shaft endless chain and toothed sprocket, as were used to transmit to the rear axle the braking power of the reversed engine itself, and the brake operated from the engine and transmitted its brake power through the same parts as did the engine itself when reversed.

(*k*) When the engine was out of gear, that is to say, the engine not connected with the transmission, the fly wheel brake could not operate as a brake nor could the engine be reversed so as to operate as a brake.

1915

CANNON v. JEFFORD.

3. On the part of the respondent it was contended:

(*a*) That the fly wheel was not an independent brake within the meaning of the Motor Cars (Use and Construction) Orders, 1904 to 1913.

(*b*) He quoted in support of his contention the case of *Wilmott* v. *Southwell.* (1)

4. On the part of the appellant it was contended:

(*a*) That there was no evidence before the justices on which they could properly find him guilty of the offence charged in the information.

(*b*) That as the back wheels on the motor car could be effectually prevented from revolving in two separate and distinct ways (*a*) by the reversal of the engine or (*b*) by the application of the fly wheel brake, the motor car complied in law with all the requirements as to brakes of the Motor Cars (Use and Construction) Orders before referred to.

(*c*) That the fly wheel brake acted separately from the reversing of the engine and that it was an independent brake within the meaning of the Orders.

(*d*) That the engine referred to in *Wilmott* v. *Southwell* (1) was a petrol engine which could not be reversed while the car was in motion as a steam engine could. That the application of a fly wheel brake to a steam engine was not analogous to the "cutting off" of the power of a petrol engine and that *Wilmott* v. *Southwell* (1) had no application to the question for the justices' decision.

5. The justices, however, were of opinion that inasmuch as the fly wheel brake and the brake brought about by the reversing of the engine had certain factors common to each, namely, the piston crank shaft chain and sprocket, and that the breakage of any of these common factors would put both brakes out of action, they were not independent of each other within the meaning of the Orders, and that, therefore, the appellant was guilty of the offence with which he was charged.

6. The question for the opinion of the Court was whether the justices came to a correct determination in point of law.

(1) (1908) 72 J. P. 491.

1915

CANNON v. JEFFORD.

Gordon Hewart, K.C., and *Procter*, for the appellant. The term "independent brakes" in the Order of 1904 as amended by the Orders of 1911 and 1913 means that there must be two brakes independent of each other within the meaning of the Orders, and in the present case the two brakes were independent of each other within the meaning of the Orders.

A reversible engine is a brake within the Order of 1904. Whether a thing is a brake or not depends upon what it does, and a reversible engine will not only stop the wheels from revolving like a brake, but will apply a power backwards. Any mechanical contrivance which will have the effect of a brake is a brake. But in order to comply with the Order of 1904 there must have been a second brake which in fact worked independently of the reversible engine. The Order of 1913 was made with the view of granting a concession and some meaning must be given to it. It provides that the reversible engine is to be deemed the second independent brake. Applying that to the present case it follows that if the second brake, i.e., the reversible engine, is to be deemed to be independent of the first, i.e., the band brake, the band brake must be deemed to be independent of the reversible engine. There were therefore two independent brakes within the meaning of the Orders. In *Wilmott* v. *Southwell* (1) the engine could not be reversed so as to act as a brake, and the decision in that case is therefore distinguishable.

Bodkin, for the respondent. The argument for the appellant is in substance an attempt to make two brakes out of one. The band round the fly wheel of the engine operates in the same manner as the engine itself.

LORD READING C.J. The appellant was convicted of causing a steam motor car which "exceeded two tons in weight unladen to be used on the highway . . . . without having a brake independent of the engine in good working order and of such efficiency that the application of it would cause two of its wheels on the same axle to be so held that the wheels would be effectually prevented from revolving."

The question which arises is whether upon the facts as proved

(1) 72 J. P. 491.

1915

CANNON v. JEFFORD.

Lord Reading C.J.

the appellant had complied with the Statutory Order of 1904 as amended by the Orders of 1911 and 1913 made under the Locomotives on Highways Act, 1896. It is said by Mr. Gordon Hewart on behalf of the appellant that no doubt the Order of 1904 as amended by the Orders of 1911 and 1913 required that there should be two independent brakes in a car of this character, but that there were two independent brakes, and that the justices were wrong in coming to the conclusion upon the facts that the reversible engine was not a second independent brake within the meaning of the Order of 1913. His very ingenious argument seemed to amount to this: that although neither of these brakes was in fact independent of the other the requirements of the Orders were satisfied. We have to consider whether upon the facts as proved there were two independent brakes within the meaning of the Orders.

We must look closely to the facts as found. It appears from paragraph 2, clauses (*f*) and (*i*), that the band brake was operated upon by the engine, "the braking power being transmitted from the fly wheel through the piston crank shaft and driving chain of the car to the back axle, and that the two wheels on that axle were so held that they were effectually prevented from revolving." That would meet the conditions under the Order of 1904 with regard to one brake. Further, the fly wheel was part of the engine of the car and the braking power was transmitted by means of the power in the engine, that is to say that the brake operated from the engine and transmitted its brake power through the same parts as did the engine itself when reversed.

The justices came to the conclusion "that inasmuch as the fly wheel brake and the brake brought about by the reversing of the engine had certain factors common to each, namely, the piston crank shaft chain and sprocket, and that the breakage of any of these common factors would put both brakes out of action, they were not independent of each other within the meaning of the Orders." It appears to me that the justices were right in that conclusion and that upon the facts as proved they could come to no other. It cannot be said that these two brakes were independent when if anything went wrong

1915

CANNON v. JEFFORD.

Lord Reading C.J.

with one brake it would put both out of action. That seems to me to be exactly what it was intended should be prevented by these Orders. What was meant was that there should be two independent brakes in the sense that one should work notwithstanding that the other could not, and that each must be able to work regardless of the other. In this case that clearly is not so, because as soon as a difficulty arose from a breakage in the engine there certainly was not then another independent brake; neither the band brake nor the reversible engine could work. Mr. Gordon Hewart has contended that under the Order of 1904 as amended by the Orders of 1911 and 1913 it must be assumed that a reversible engine is a second independent brake within the meaning of the Order of 1904, that is to say, if there is a reversible engine which would have the effect of stopping the motor car in the same manner as if both wheels had been held, that engine is itself a brake, and it would have been so held under the Order of 1904. He says the effect of the Order of 1913 is that, supposing you have an engine of that kind and it is capable of reversing, it is not only to be deemed to be a brake but it is to be deemed to be a second independent brake, notwithstanding that the first brake has to be operated by means of what for this purpose I will call the second brake, that is the reversible engine. I am unable to arrive at that conclusion. In my judgment the justices were right in the view they took, and if they had taken the other view they would have failed to give effect to the intention of the framers of these Orders under the Act of 1896. In my opinion therefore this appeal fails.

RIDLEY J. I agree with the judgment of the Lord Chief Justice and with his reasons. I think the Order of 1913 means to say that the engine if reversible shall be deemed to be the second independent brake required; but then a second independent brake requires a first independent brake. That is what is required and it does not exist in this case.

AVORY J. I am of the same opinion. I will only add that paragraph 2, clause (*k*), of the case states that when the engine

1915

CANNON v. JEFFORD.

Avory J.

was out of gear, that is to say not connected with the transmission, the fly wheel brake could not operate as a brake, nor could the engine be reversed so as to operate as a brake. The result of that appears to me to be that the engine being out of gear (which would be I presume the ordinary condition if the vehicle was going down a hill), neither of these brakes could operate, and how a thing could be said to have two independent brakes when the conditions are such that it has no independent brake at all, I am at a loss to understand.

Appeal dismissed.

Solicitors for appellant: *Billing & Co., for F. J. & C. Poole, Sandbach.*

Solicitors for respondent: *Wontner & Sons.*

J. E. A.

[IN THE COURT OF APPEAL.]

C. A.

1915

July 7.

KING *v.* EARL CADOGAN.

Landlord and Tenant — Licensed Premises — Lease made before Finance (1909-10) *Act*, 1910—*Increased Licence Duty—Liability of Grantor of Lease to pay Proportion of Increase—"Premium" payable by Lessee—Cost of rebuilding Premises by Lessee pursuant to Agreement for Lease—Surrender Value of prior Unexpired Lease—Finance Act*, 1912 (2 & 3 *Geo.* 5, *c.* 8), *s.* 2.

Where, in pursuance of an agreement for a lease of licensed premises made before 1910, the lessee has expended a large sum in rebuilding the premises and has surrendered an unexpired lease of the premises, and the lessor has then granted the lease, neither the sum so expended nor the surrender value of the prior lease is a "premium" payable by the lessee within s. 2 of the Finance Act, 1912, to be taken into account in determining what proportion, if any, of the increased duty can be recovered by the lessee from the lessor under s. 2.

Decision of the Divisional Court [1915] 1 K. B. 821 affirmed.

APPEAL from the Divisional Court (1) reversing a decision of the Brompton County Court in an action by the plaintiff King to determine what proportion (if any) of the increased licence

(1) [1915] 1 K. B. 821.

C. A. 1915

KING v. CADOGAN (EARL).

duty of a public-house he was entitled to recover from the defendant, his landlord, under s. 2 of the Finance Act, 1912.

The plaintiff was the lessee and licensed occupier of the "King's Arms" public-house, Sloane Square, under a lease dated October 16, 1900, of which the defendant was the grantor, for the term of ninety-nine years from March 25, 1897, at the yearly rent of 300*l.* That lease had been granted in pursuance of an agreement made in August, 1898, between the defendant and one Lillies, who was the holder, as assignee, of a lease of the public-house for a term of sixty years from November 14, 1853, at the yearly rent of 66*l.* 10*s.* In 1898 the lease of 1853, and the agreement and the benefit thereof, had become vested in the plaintiff by assignment.

By the agreement it was provided (inter alia) that Lillies should at his own expense remove the buildings known as the "King's Arms" public-house and should in lieu thereof, at his own expense, build a new public-house on the site so cleared, expending in erecting such public-house a sum of not less than 4000*l.* It further provided that Lillies should surrender to the defendant, at his own expense, the lease of 1853; and that, subject to the provisions thereof, as soon as Lillies should have erected the public-house in accordance with the terms of the agreement the defendant would grant to him a lease in the form scheduled to the agreement.

The plaintiff having so rebuilt the public-house, and surrendered the lease of 1853, the defendant duly granted to him the lease of 1900, which was expressed to be so granted in consideration (inter alia) of the expense incurred by him in rebuilding the premises.

The plaintiff contended that the sum expended by him in rebuilding and the surrender value of the lease of 1853 were each a "premium" within the meaning of the Finance Act, 1912, s. 2. (1)

(1) Finance Act, 1912 (2 & 3 Geo. 5, c. 8), s. 2: "Where the licensed premises are held under a lease or agreement for lease made before the passing of the Finance (1909-10) Act, 1910, which does not contain or import any covenant, agreement, or undertaking on the part of the lessee under such lease or agreement for lease to obtain a supply of intoxicating liquor from the grantor of the lease or agreement for lease, the

The duty payable in respect of the licence of the premises previous to the Finance (1909-10) Act, 1910, was 60*l.*, but had since been increased by 116*l.* 10*s.* to 176*l.* 10*s.* After August 7, 1912, the plaintiff neither deducted nor recovered any sum from the defendant in respect of the increased duty, nor was the proportion agreed between them.

By this action the plaintiff claimed a determination by the Court of how much of the increase of duty he was entitled to recover as a debt due from the defendant to him, or to deduct from any sum due from him to the defendant, and claimed to recover or deduct in respect of the said increase the duty paid by him.

The county court judge found that the plaintiff, in complying with the terms of the agreement, had expended 5000*l.* upon the premises, and that the surrender value of the lease of 1853 was the sum of 2530*l.*; and he held that each sum was a "premium" within the meaning of s. 2, and that the defendant was bound to pay a proportionate part of the increased licence duty amounting to 65*l.* a year.

From this decision the defendant appealed, and the Divisional Court reversed the decision of the county court judge, being of opinion that neither the sum so expended nor the surrender value of the earlier lease was a "premium" payable by the lessee within the meaning of s. 2 of the Finance Act, 1912.

The plaintiff appealed.

Disturnal, K.C., and *A. F. W. Wootten*, for the appellant. Both the surrender value of the old lease and the expenditure of

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lessee under such lease or agreement for lease shall be entitled, notwithstanding any agreement to the contrary, to recover as a debt due from, or deduct from any sum due to, the grantor of such lease or agreement for lease so much of any increase of the duty payable in respect of the licence under the provisions of the Finance (1909-10) Act, 1910, as may be agreed upon as proportionate to any increased rent or premium payable in respect of the premises being let as licensed premises, and, in default of agreement, the amount proportionate to such increased rent or premium shall be determined in manner directed by rules of Court by a county court in England or Ireland and by a sheriff court in Scotland.

"The words 'lease,' 'leased,' 'agreement for lease,' and 'lessee' in this section include sub-lease, sub-leased, agreement for sub-lease, and sub-lessee, respectively."

C. A. 1915

KING v. CADOGAN (EARL).

5000*l.* upon rebuilding in consideration of which the new lease was granted are covered by the word "premium" in s. 2 of the Act of 1912. The tenant has a property, consisting of the unexpired lease, of the value of 2530*l.*, which if spread over the term would amount to 128*l.* per annum. That property he hands over to the landlord, who thereupon grants him a fresh lease at an increased rent. The landlord in the result gets the benefit of the surrender. It is the same thing in effect as if the tenant had paid the landlord that sum and taken a long lease at a rent of 300*l.* per annum. There is nothing in, or to be gathered from, the Act which requires the tenant to give or pay the landlord money or money's value. It was suggested by the Divisional Court that on the true construction of the Act the words "payable by the tenant to the landlord" must be read into the section, and that for that reason the decision in *Camden* v. *Inland Revenue Commissioners* (1) did not govern this case, as it is submitted that it does.

Further, the 5000*l.* expended on the rebuilding was in fact a premium and falls directly within the example given by the Master of the Rolls in *Camden* v. *Inland Revenue Commissioners*. (2) Whether the tenant in complying with his obligation to rebuild spends the 5000*l.*, or the landlord spends it and is recouped that amount by the tenant, as consideration for the grant of the lease, amounts to the same thing, and in either case the money expended by the tenant is a premium or in the nature of a premium and comes within s. 2.

Ryde, K.C., and *G. C. Whiteley*, for the respondent. This statute applies only to existing contracts and must be construed strictly. "Premium" is an inapt word to apply to the present case, and the 5000*l.* spent on the buildings is not of the same nature as a premium paid to the landlord which he could have put in his own pocket or spent how he liked. Non constat that he could not have obtained a rent of 300*l.* for the old buildings, or that having regard to the neighbourhood a good shop on the site might not be worth more than a public-house.

The tenant, and not the landlord, has obtained the benefit of

(1) [1914] 1 K. B. 641; affirmed [1915] A. C. 241.

(2) [1914] 1 K. B. 641, 653.

the surrender because the landlord has taken a lower rent for the whole of the new term instead of getting a low rent for the unexpired residue of the old lease and a much higher rent than 300*l.* afterwards. The surrender of a lease is not a payment: per Rowlatt J. in *Inland Revenue Commissioners* v. *St. John's College, Oxford.* (1) The decision of the Divisional Court was right.

Disturnal, K.C., in reply.

LORD COZENS-HARDY M.R. This is an appeal from a judgment of the Divisional Court, reversing the judgment of the county court judge, holding that the plaintiff, a lessee of a public-house, is not entitled to any payment from Lord Cadogan under the provisions of s. 2 of the Finance Act, 1912.

There is no general principle, contribution or otherwise, upon which the plaintiff can base his claim. All that may be said is, "I am suing you, Lord Cadogan, by reason of an obligation which is imposed upon you by s. 2"—which I shall read in a minute—"an obligation which did not exist before. It is a new obligation which I seek to enforce in this action." That being so, it is to my mind quite clear that no larger or wider obligation can rest upon Lord Cadogan than is found in the express language of the section itself. I see no justification for proceeding by way of analogy or extension, or for saying that Parliament obviously must have meant something which is not expressly said. That is an argument which does not appeal to me at all, and I think we ought not to listen to it. I want to consider in a very few sentences what is the meaning and the effect of this section and to see whether the plaintiff has made out his case.

The public-house in question is a valuable public-house. It was held under a long lease from 1853 for sixty years at a rent of 66*l.* a year. That lease was surrendered in 1898 upon the footing of an agreement that the tenant, who had fifteen or sixteen years more to run of his old lease, would surrender that lease and spend 4000*l.* at least in pulling down and rebuilding the premises, and then, when that work was done, the landlord would grant, as he did grant, a lease for ninety-nine years from

(1) [1915] 2 K. B. 621, 638.

C. A. 1915

KING v. CADOGAN (EARL).

Lord Cozens-Hardy M.R.

1897 at a rent of 300*l.* odd. That being the state of things, we come now to the consideration of the Act.

Certain licence duties were payable under the old Act. Those duties were greatly increased by the Act of 1910. It was thought necessary to give, not a general protection to all persons interested in licensed houses, but to certain defined persons only. I will read it now: "Where the licensed premises are held under a lease or agreement for lease made before the passing of the Finance (1909-10) Act, 1910, which does not contain or import any covenant, agreement, or undertaking on the part of the lessee under such lease, or agreement for lease to obtain a supply of intoxicating liquor from the grantor of the lease or agreement for lease, the lessee under such lease or agreement for lease shall be entitled, notwithstanding any agreement to the contrary, to recover as a debt due from, or deduct from any sum due to, the grantor of such lease or agreement for lease"—I pause there for a moment to say that it only refers to a grantor and does not apply to a grantee—"so much of any increase of the duty payable in respect of the licence under the provisions of the Finance (1909-10) Act, 1910, as may be agreed upon as proportionate to any increased rent or premium payable in respect of the premises being let as licensed premises, and, in default of agreement, the amount proportionate to such increased rent or premium shall be determined in manner directed by rules of Court by a county court in England or Ireland."

It is contended that the 5000*l.* spent by the lessee in 1897 and 1898 is a premium payable in respect of the premises. "Premium" is a word of art. It seems to me to be unreasonable to say that the expenditure in pulling down the old buildings and rebuilding them was a premium in any sense in which that word of art can be used. I agree that it is not necessary that a premium, in its true sense, should be paid in that sense—it may be not payable to the lessor but to the trustees of the settlement; but you must have that which in its nature and true sense is a premium payable. In my opinion there is no justification for saying that the expenditure of 5000*l.* in any sense of the word was a premium payable in respect of the licensed premises.

C. A.
1915
KING
v.
CADOGAN
(EARL).
Lord
Cozens-Hardy
M.R.

Then it was argued that the surrender of the lease was something which ought to be taken into consideration, and it was said that the surrender value of the old lease was 2530*l.*, or, if that is spread over the whole ninety-nine years, that amounted to 128*l.* a year. I think I cannot do better than adopt the language used by Rowlatt J. in the *St. John's College Case* (1), to which our attention has been called. The surrender of the lease is not a payment, although it is desired to call it so.

In my opinion the decision of the learned judges in the Divisional Court was quite right, and this appeal must be dismissed with the usual consequences.

PICKFORD L.J. I agree. The question is whether the plaintiff comes within s. 2 of the Finance Act, 1912. The section was for the purpose of relieving the lessees of licensed houses with respect to the increased duty and it provided that a proportion should be deducted from their rent. Putting it shortly it provided that a proportion of it should be deducted from so much of their rent, or of the premiums, as is attributable to the fact of the house being a licensed house. The words are "to recover as a debt due from, or deduct from any sum due to, the grantor of such lease or agreement for lease so much of any increase of the duty payable in respect of the licence under the provisions of the Finance (1909-10) Act, 1910, as may be agreed upon as proportionate to any increased rent or premium payable in respect of the premises being let as licensed premises, and, in default of agreement, the amount proportionate to such increased rent or premium shall be determined in manner directed by rules of Court by a county court in England or Ireland." So that unless it is "increased rent or premium" the case does not come within this section.

A good deal of the argument before us was directed to show that this ought to be called a "premium" because it was intended that where an advantage was obtained by the lessor he should contribute in respect of it and that the advantage was equivalent to what he would get by the payment of a premium. Now that, I think, it is unnecessary to consider. I do

(1) [1915] 2 K. B. 621, 638.

C. A. 1915

KING v. CADOGAN (EARL).

Phillimore L.J.

not know whether the Act intended it, or whether that was the object of it, but the Legislature has thought fit to use perfectly well known words—"increased rent or premium"—and I do not think it is possible to say that the advantage to be derived by the landlord here can posssibly be brought within the meaning of those words. That seems to me to be quite sufficient to dispose of this case, and I do not propose to enter upon the other question.

I agree that this appeal should be dismissed.

WARRINGTON L.J. The plaintiff in this case sues to recover a statutory debt—a debt created by the Finance Act, 1912, s. 2. That debt is described in the Act as being "so much of the increased licence duty"—I am putting it shortly—"as is proportionate to the increased rent or premium payable in respect of the premises being let as licensed premises." Now, the plaintiff seeks to make out in this case that there is an increased rent or premium payable in respect of the premises being let as licensed premises by treating as premium, first, moneys expended by the lessee in pursuance of the agreement under which the lease was granted in building the premises comprised in the lease, and, secondly, the value of the unexpired residue of the term which was surrendered on the granting of the present lease. The question we have to determine is whether those items can be treated as premiums.

In my opinion, it is important in considering every statute, and in particular in considering a statute which creates for the first time a statutory debt, to adhere as closely as can be to the words of the statute and not to give conjectural interpretations to the words the Legislature has used. Now the Legislature in expressing its intention has chosen to use two words—"rent" and "premium"—both of which in connection with leases have perfectly well known legal meanings. I need not say anything about the meaning of the word rent, but "premium," as I understand it, used as it frequently is in legal documents, means a cash payment made to the lessor, and representing, or supposed to represent, the capital value of the difference between the actual rent and the best rent that might otherwise be obtained.

It is a very familiar expression to everybody who knows the forms and powers of granting leases. It is in fact the purchase-money which the tenant pays for the benefit which he gets under the lease. Is it possible by any means to give to either of these items, which the plaintiff seeks to bring in, the meaning of the word "premium"? It seems to me that it is quite impossible. The expenditure on the house is not in any sense a "premium," and still less is the value of the surrendered lease, as to which it seems very doubtful whether the landlord ever got the benefit of it at all.

Warrington L.J.

On the whole, therefore, I think the appeal fails and the Divisional Court was right.

Appeal dismissed.

Solicitors: *Crossman, Prichard & Co.; Lee & Pembertons.*

R. M.

WILLIAMS *v.* LEWIS.

1915

[1914 W. 2486.]

June 23, 24, 26, 28; *Oct.* 14.

Landlord and Tenant—Agricultural Land—Duty of Tenant to cultivate—Breach—Measure of Damages.

The duty of a tenant of agricultural land as declared by the common law and unaffected by express agreement is to cultivate the land in a good and husbandlike manner according to the custom of the country.

He is not further bound to deliver up the land at the end of the tenancy in a clean and proper condition, properly tilled and manured; nor is he necessarily bound or entitled to leave the land in the same condition as when he took it.

In case of a breach of his duty the measure of damages is the injury to the reversion occasioned by the breach.

TRIAL of action before Bray J.

The action was commenced at the Monmouthshire Summer Assizes before the learned judge and a special jury. In the course of the hearing the jury were discharged and the case proceeded before the learned judge alone.

1915

WILLIAMS v. LEWIS.

S. R. C. Bosanquet, for the plaintiff.

Micklethwait, for the defendant.

The facts and arguments sufficiently appear from the judgment.

Oct. 14. BRAY J. read the following judgment:—This action was brought by the plaintiff, the landlord of a farm called the Twyn Farm in Llangibby, Monmouthshire, against the defendant, the late tenant of the farm, to recover damages for breach of his implied obligation arising out of the tenancy. The tenancy agreement was not in writing, and, so far as appeared, there were no special terms. The tenancy began in February, 1906, and ended in February, 1914. Several points of law were raised as to the extent of the implied obligations, and as to the measure of damages for their breach. As I was informed that it was desirable that there should be a decision on these points, I propose to deal with all of them, although some are not necessary for the decision of the case; and for this reason I have thought it better that I should put my judgment into writing.

The first question is: What is the extent of the implied obligations of the tenant of a farm to his landlord? I think the law is correctly stated in vol. 1 of Lord Halsbury's Laws of England, title Agriculture, s. 505, thus: "The law implies an undertaking or covenant on the part of an agricultural tenant to cultivate the land in a husbandlike manner, unless there is a particular agreement dispensing with that engagement; and the bare relation of landlord and tenant is a sufficient consideration for the tenant's promise to cultivate the land in a good and husbandlike manner according to the custom of the country." Farming in accordance with this obligation I will for short call "proper farming," and the condition of the land when it has been so farmed for a lengthened period I will call "proper condition." Sect. 507 says the custom of the country does not imply an immemorial or universal usage, but only the prevalent usage of the neighbourhood where the land lies which has subsisted for a reasonable length of time; and s. 509 says evidence showing that a holding has been managed in accordance with the custom of the

country is proof that it has been treated in a good and husband-like manner. It was not really disputed that the law was as so laid down, but it was contended for the plaintiff that there was a further obligation, namely, that the tenant should deliver up the land at the termination of the tenancy in a clean and proper condition, properly tilled and manured. In my opinion, so far as this imports some greater obligation than the first obligation, it does not exist. That the tenant must continue to farm properly down to the termination of the tenancy is, of course, true, but so long as he does this he has, in my opinion, performed the whole of his obligation. I will give an illustration to show what I mean. Suppose that at the beginning of the tenancy the land is in an impoverished condition, that is, below proper condition, and the tenant enters and farms properly, but yet the land at the end of the tenancy has not got into proper condition. This may well happen if the tenancy has been a short one, say only two or three years. In such a case there has been, in my opinion, no breach of the obligation. The contention of the plaintiff would impose it, but the contention is wrong. I ought to add that in this case I find there was no custom imposing this greater obligation.

The next contention was one on the part of the defendant, not, perhaps, much relied on by the defendant's counsel, but put forward by the defendant himself and one of his witnesses, that the tenant fulfilled his obligation if he left the land in the same condition as when he took it. First I am satisfied there is no custom to that effect. It was said there was a custom that the tenant goes out as he comes in. This has no reference to claims for bad farming, it applies only to valuations of tenant right. As an illustration it applies in such a case as this : If a tenant on coming in pays for hay and straw at a fodder and dung price he is only entitled to fodder and dung price on leaving. The expert called by the defendant admitted this. So much for the custom. In my opinion the contention is not sound in law. It may well be that a considerable course of proper farming will restore the land to proper condition. If so the landlord has a right to have the land delivered up in proper condition. In the same way, if at the commencement of the tenancy the land is in better than

1915

WILLIAMS v. LEWIS.

Bray J.

proper condition as the result of what is called high farming, the tenant is not, in my opinion, bound to keep the land in better than proper condition so long as he farms properly. Arising out of this there was a contention that if the tenant during the tenancy had raised the land to a better condition than it had been at the commencement, he might during the last year or two lower it to the former condition. That contention is, in my opinion, equally unsound; he must continue to farm properly to the end of his tenancy. He need not do more than that, but he must do that. I must guard myself by saying that this does not involve the proposition that if a tenant has at any time got the land into a condition better than proper condition he must always keep it so, but merely that he must not lower it by improper farming. For instance, if he has been putting a lot of dung on a field it might not be improper farming in the case of grass land to mow it two years running, or in the case of arable to have two crops of corn running. The truth is that, when the land is at the commencement of the tenancy in better or worse condition than proper condition, it is proper and usual for the landlord and tenant to come to a special arrangement, and when the land is impoverished, that is, below proper condition, the tenant requires a temporary or permanent reduction of rent, or other allowance.

The next contention on the part of the defendant was that this was what is called a bytake. The tenant had rented for a considerable time before he took Twyn Farm a neighbouring farm called the Tregrwg Farm from the same landlord, on which there were a house and the usual farm buildings. On Twyn Farm in question there was no house, nor any farm buildings, and it was said that if Tregrwg Farm was in better than proper condition that would make up for Twyn Farm being in worse than proper condition, and that the two farms must be considered as one farm. In my opinion this contention is not sound. First I find that there is no custom to that effect; the land must be treated fairly all round. No doubt it happens that the land most distant from the foldyard gets less dung, but then it should be mown less often and grazed more. No doubt also it will happen that at any particular period some

fields may be in rather better condition than others. Of course there must be some give and take, but that would not justify a deliberate starving of the land without buildings, even though the land with the buildings has been correspondingly enriched. In this case the two tenancies were entirely separate. They were entered into at different times. Notice might be given, and was in fact given, to terminate one only, and Tregrwg was held for another year after the expiration of the tenancy of Twyn Farm. In my opinion this contention fails in law as well as in fact.

Lastly, there was a contention on the part of the defendant as to the measure of damages in case there was a breach by the tenant of his implied obligation through not having farmed properly. It was said that it was confined, so far as loss of fertility was concerned, to the manurial value of hay or straw improperly removed. For the purpose of estimating tenant right a table was published in the county giving manurial values for hay and straw fed on the land, and it was said that that table applied, and I could only give the manurial values shown in the table for the hay and straw that had been improperly removed. No such custom was proved, and in my opinion that is not the true measure of damages in all cases. In some cases when the only ground of complaint is that hay and straw have been improperly sold or removed instead of feeding them on the land, that may afford a good guide in assessing the damages, but, as will be seen later, this was by no means the only complaint. As the evidence proved no custom as to the measure of damages, the usual rule of law must, in my opinion, be followed in respect of all the breaches, namely, that it is the injury to the reversion occasioned by the breaches. In practice in such a case as the present it is the diminution in the rent that the landlord will get on reletting, or the allowance he will have to make to the incoming tenant. When a tenant is making his bargain with the landlord as to the rent he is to pay it is a common thing for him if he sees that the land is below proper condition to say that he must have it free of rent for a period, or at a smaller rent for the whole or some part of the tenancy. If a fair bargain is made and a reduction of rent agreed to, that forms a fair

1915

WILLIAMS v. LEWIS.

Bray J.

indication of the loss to the landlord occasioned by the breach. That I find is what happened here. Mr. Hannah, the incoming tenant, had agreed to take the farm some time before February, 1914, but no rent had been definitely fixed. Some time before February, 1914, he complained to the plaintiff of the condition of the farm, and he asked to have it free of rent for twelve months. There was a good deal of negotiation between them, and in fact he entered into possession in February, 1914, before the negotiations were concluded. The negotiations ultimately resulted in an agreement that he should be compensated by receiving the damages which the plaintiff might recover in the present action. This was, no doubt, an equitable arrangement, but it does not help me because I have to assess the damages. This agreement will not affect the damages. The landlord will recover no more and no less than he is entitled to in law. I have to solve the problem of arriving at what was the injury to the reversion. I think I have now dealt with all the questions of principle, and will now consider whether there have been any, and what, breaches by the defendant of his implied obligations, and to assess the damages.

Now the plaintiff claimed that there were the following breaches : First, that in respect of the whole of the grass land, namely, about forty-eight acres, the defendant had during the last year but one, namely, 1912, mowed forty-one acres, and during the last year had mowed the whole forty-eight acres. Next, that as regards one of the two arable fields, namely, a field of eight acres, he had during the last two years had two crops of oats in succession, and had also left it in very foul condition and full of couch ; next, that he had neglected the hedges and fences ; and, lastly, that he had neglected to properly clean out the ditches and grips. It was contended on the part of the plaintiff that the defendant had done this deliberately in revenge for having had his tenancy terminated by notice to quit. The defendant denied the breaches, and said that if there had been any such breaches the land was in as good a condition as, or in a better condition than, the land had been at the commencement of his tenancy.

[The learned judge then discussed the facts in detail and found

that the defendant had committed various breaches of his obligation. Judgment was given for the plaintiff for 83*l.* 12*s.* 6*d.*] 1915

WILLIAMS v. LEWIS.

Judgment for plaintiff.

Solicitors for plaintiff: *Kinch & Richardson, for Percy Laybourne & Co., Newport, Monmouthshire.*

Solicitors for defendant: *Taylor, Rowley & Co., for E. Waddington, Usk.*

W. H. G.

[IN THE COURT OF APPEAL.]

C. A.

1915

June 24, 25, 28, 30.

O'DRISCOLL AND ANOTHER *v.* MANCHESTER INSURANCE COMMITTEE.

[1914 O. 175.]

Practice—Attachment of Debts—"Debt"—Fees payable by National Insurance Committee to Panel Doctor—National Health Insurance (Administration of Medical Benefit) Regulations, 1912, *arts.* 39, 40, 42—*National Health Insurance (Medical Benefit) Regulations (England)*, 1913, *arts.* 35, 37—*National Insurance Act*, 1911 (1 *& 2 Geo.* 5, *c.* 55)—*Rules of the Supreme Court*, 1883, *Order* XLV., *r.* 1—*Issue as to Debt owing or accruing—Reference to Master to ascertain Amount—Appeal from Finding of Master.*

An insurance committee, acting under the National Insurance Acts, 1911 and 1913, and the Regulations made thereunder, entered into agreements with the panel doctors of their district by which the whole amounts received by the committee from the National Insurance Commissioners were to be pooled and distributed among the panel doctors in accordance with a scale of fees; the total amount available for medical benefit so received by the committee was to be the limit of their liability to the panel doctors; and if the total pool was insufficient to meet all the proper charges of the panel doctors in accordance with the scale there was to be a pro rata reduction for each doctor, and on the other hand if it should be in excess of the amount required the balance was to be distributed among the panel doctors:—

Held, that where a panel doctor has done work under his agreement with the insurance committee, and the committee have received funds in respect of medical benefit from the National Insurance Commissioners, there is a debt owing or accruing from the insurance committee to the panel doctor which may be attached under Order XLV., r. 1, notwithstanding that as a matter of calculation the exact share payable to him may not yet have been ascertained.

Decision of Rowlatt J. [1915] 1 K. B. 811 affirmed.

Where a garnishee issue is tried by a judge without a jury, and the

C. A.
1915

O'DRISCOLL
v.
MANCHESTER
INSURANCE
COMMITTEE.

judge finds that there is a debt owing or accruing, but refers it to the Master to ascertain the amount with an order for payment of the amount so found to be due, an appeal from the finding of the Master lies to the Divisional Court and not direct to the Court of Appeal.

APPEAL from an order of Rowlatt J. upon the trial without a jury of an issue; reported [1915] 1 K. B. 811.

On March 27, 1914, the present plaintiffs, who were the executors of one John O'Driscoll, recovered judgment against W. D. Sweeny, a medical practitioner in Manchester, for 246*l.* 15*s.* 6*d.* and 9*l.* for costs.

As the judgment remained unsatisfied, a garnishee order was obtained by the plaintiffs on April 9, 1914, attaching all debts owing or accruing due to Dr. Sweeny from the Manchester Insurance Committee, to answer the judgment, and the garnishees were ordered to attend on an application by the plaintiffs for an order that they should pay the debt alleged to be due from them to Dr. Sweeny, or so much thereof as might be sufficient to satisfy the judgment.

On the hearing of the last-mentioned application it was ordered by Master Chitty that the plaintiffs and the garnishees should proceed to the trial of an issue by a judge without a jury, and that the question to be tried should be whether on April 9, 1914, the garnishees were indebted to the judgment debtor in any and what sum. The plaintiffs affirmed and the garnishees denied that on that date the garnishees were indebted to the said judgment debtor in the sum of 225*l.* 15*s.* 6*d.* or part thereof, or, alternatively, if so indebted, that the amount due was in law capable of being attached.

By s. 59 of the National Insurance Act, 1911, it is provided that an insurance committee shall be constituted for every county and county borough. By s. 14 the administration of benefits is to be by approved societies or the insurance committees, and by s. 15 every insurance committee is required, for the purpose of administering medical benefit, to make arrangements with duly qualified medical practitioners in accordance with regulations made by the Insurance Commissioners who are constituted by s. 57 of the Act. By s. 30 of the National Insurance Act, 1913 (3 & 4 Geo. 5, c. 37), every insurance committee constituted

under s. 59 of the principal Act is constituted a body corporate and may sue and be sued.

In fulfilment of the duties cast upon them by the Acts and Regulations (1) the Manchester Insurance Committee (the garnishees) in January, 1913, entered into agreements with medical

(1) The National Health Insurance (Administration of Medical Benefit) Regulations, 1912, were issued on December 5, 1912, and remained in operation during the year 1913. They are set out in the Statutory Rules and Orders, 1912, pp. 865 et seq.

Art. 39: "All moneys available to the committee for the purposes of the treatment under arrangements made by the committee with practitioners on the panel of insured persons (in these Regulations referred to as 'persons on panel lists') obtaining treatment from those practitioners (including any parliamentary grant or portion of a parliamentary grant paid or to be paid to the committee in respect of the treatment of those persons for that year) shall be credited to, and all payments to practitioners on the panel in respect of the treatment of insured persons by them shall be charged to, a fund to be established by the committee (in these Regulations referred to as the 'panel fund'), and there shall be paid accordingly to each practitioner on the panel out of the panel fund amounts calculated in accordance with the method of remuneration adopted by the committee."

Art. 40: " . . . . (2.) Where the committee have adopted a system of payment by attendance, they shall credit to each practitioner on the panel in respect of each service rendered by him an amount (in these Regulations referred to as an 'attendance fee') calculated in accordance with the rate contained in his agreement with the committee.

"(3.) The committee shall ascertain the aggregate amounts so credited to the practitioner and the aggregate amounts so credited to all practitioners on the panel, and shall pay to each practitioner an amount bearing the same proportion to the sum credited to him as the amount in the panel fund available for the purpose, after deducting any sum set apart for mileage in accordance with these Regulations, bears to the aggregate amounts so credited to all the practitioners."

Art. 42: "(1.) Every practitioner on the panel shall on dates to be appointed by the Commissioners furnish to the committee quarterly accounts in a form provided by the committee, containing such particulars as may be necessary for calculating the amount of remuneration payable to him by the committee.

"(2.) As soon as may be after the receipt of an account the committee shall pay to the practitioner such sum as may be agreed between the committee and the practitioners on the panel in advance of the amount due to him, and shall pay the balance of the amount so due as soon as may be after the expiration of the year; but before payment of the balance the committee shall submit all accounts to a committee appointed by the practitioners on the panel, which committee shall have power to reduce or disallow any item of any account submitted to them."

C. A. 1915

O'DRISCOLL v. MANCHESTER INSURANCE COMMITTEE.

practitioners in Manchester, including Dr. Sweeny, for the provision of medical attendance to insured persons for the first three months of the year (ending on April 14) on the terms set out in the scheme accompanying the circular letter of the clerk to the Insurance Committee dated January 7, 1913. The circular letter stated that the Insurance Committee were prepared to make the following arrangements with the doctors for the provision, in accordance with the Act and Regulations of the Commissioners, of medical benefit to insured persons in their area, and domiciliary treatment of such persons suffering from tuberculosis. Paragraphs 1, 2, and 3 were as follows: "(1.) The committee will undertake that the total sums available for medical attendance and treatment, viz., 6*s*. 6*d*. per head for twelve months for each insured person and 6*d*. per head for twelve months for the domiciliary treatment of insured persons suffering from tuberculosis, shall be ascertained and the total sum shall be pooled and distributed among the doctors giving medical treatment and attendance to insured persons in that area in accordance with a scale of fees or remuneration to be settled by the Manchester Insurance Committee and a committee of doctors selected by the doctors practising in the area who undertake to give the service. (2.) The total amount available shall be the limit of the liability of the Insurance Committee (except for drugs and medical appliances), and each doctor accepting service must give an undertaking that he will not make any claim or bring any action against an insured person or this Insurance Committee for additional payment. (3.) If the total pool is insufficient to meet all the proper charges of the doctors in accordance with the scale there will be a pro rata reduction for each doctor, and, if it should be in excess of the amount required, the balance will be distributed equitably at the discretion of the doctors in the list." By paragraph 4, the account of each doctor was to be submitted to the committee of doctors, who were to examine it and certify the amount as passed by them

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By art. 2, "year" means medical year; and "medical year" means the period ending on January 14, 1914, and any successive similar period fixed by the Commissioners for the purpose.

and then send the account to the Insurance Committee for payment out of the fund. The committee of doctors had power to reduce or disallow any item of the account.

The Insurance Committee adopted a system of payment by attendance.

On April 11, 1913, Dr. Sweeny made an agreement with the Manchester Insurance Committee to continue the above agreement for a further period of three months ending on July 14, with certain modifications not material to this case; and on July 17, 1913, he made an agreement with the committee to continue his services for a further period of six months ending on January 14, 1914, on similar terms.

On January 5, 1914, Dr. Sweeny made a further agreement with the Insurance Committee (1) to give medical attendance and treatment to insured persons. Clause 1 of this agreement incorporated the National Health Insurance (Medical Benefit) Regulations (England), 1913 (2); and clause 10 provided that

(1) This agreement was in a printed form and was stated to be the form always adopted by insurance committees where the payment is by attendance. Though the medical year for 1913 terminated on January 14, 1914, a change was made for 1914, and the medical year terminated on December 31, 1914.

(2) By the National Health Insurance (Medical Benefit) Regulations (England), 1913, which were issued on January 10, 1914, and which revoked the Regulations of 1912, insurance committees have, by art. 4, for the purpose of providing treatment for insured persons, to enter into written agreements with such practitioners as are willing to undertake the treatment of insured persons on the terms of the agreement.

Art. 35, clause 2: "Where the committee have adopted a system of payment by attendance they shall credit to each practitioner on the panel, in respect of each service rendered by him, an amount (in these Regulations referred to as an 'attendance fee') calculated in accordance with the rate contained in his agreement with the committee: Provided that, if the panel committee" (i.e., a committee appointed by the medical practitioners) "so require, the accounts of practitioners shall be submitted to the panel committee, and they shall be entitled to reduce or disallow any item of any account, and the sums to be credited to practitioners under this article shall be based on the accounts as so adjusted by the panel committee." Clause 3: "The committee shall ascertain the aggregate amounts so credited to the practitioner and the aggregate amounts so credited to all practitioners on the panel, and shall pay to each practitioner an amount bearing the same proportion to the sum credited to him as the amount in the practitioners' fund" after

C. A. 1915

O'DRISCOLL v. MANCHESTER INSURANCE COMMITTEE.

"the remuneration of the practitioner in respect of patients, other than temporary residents shall be calculated in accordance with the provisions of Part IV. of, and the First Schedule to, the Regulations on the basis of the scale contained in the Second Schedule hereto, and in respect of patients who are temporary residents shall be calculated in accordance with the provisions of Part IV. of the Regulations and on the basis of the scale contained in the Fifth Schedule to the Regulations." These schedules contained a scale of remuneration for each attendance and for special treatment. No limit of time was specified in the agreement, but by art. 17 of the Regulations a medical practitioner could withdraw from the panel list of doctors on giving a certain notice. The agreement came into force on January 12, 1914.

Dr. Sweeny served under the above-mentioned agreements as a panel doctor in Manchester for the years 1913 and 1914. In respect of the year 1913 the garnishees paid by way of provisional quarterly payments to panel doctors as much as the funds at their disposal enabled them to pay. Sums were thus paid to Dr. Sweeny in respect of that year amounting in all to 257*l.*, the last payment having been made on March 4, 1914, but with each of those payments a letter was sent stating that a full settlement could not be arrived at until after the expiration of the current medical year when the amount of the panel fund had been ascertained. In February, 1914, the garnishees received a sum of 29,900*l.* from the National Health Commissioners, but that sum was not allocated to any particular purpose; it was required for all the purposes of the

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certain deductions "bears to the aggregate amounts so credited to all the practitioners."

Art. 37: "As soon as may be after the expiration of each quarter the committee shall pay to each practitioner such sum as may be agreed between the committee and the panel committee in advance of the amount due to him, without prejudice, however, to the power of the committee, at such other times as they may think fit, to pay to a practitioner such other sums on account as they may determine, and shall pay the balance of the amount so due as soon as may be after the expiration of the year."

Arts. 35 and 37 were contained in Part IV. of the Regulations.

These Regulations are set out in the Statutory Rules and Orders, 1914, vol. 2, pp. 201 et seq.

garnishees' administrative work, and it did not appear that any part of that sum was allocated to the several funds for the year 1913. It appeared, however, from the quarterly accounts sent in by Dr. Sweeny in 1913 that if the panel fund when ascertained was sufficient to meet all similar accounts from the other panel doctors in Manchester there would be due to Dr. Sweeny a sum of about 298*l.* for that year, but as the accounts had not been made up it could not be ascertained whether he would in fact be entitled to receive that sum or indeed any part of it. The secretary to the garnishees said in evidence that the garnishees had not been informed by the Insurance Commissioners, under whose control the insurance fund was and who distributed it among the various insurance committees, what amount was available for payment of doctors for 1913; that he did not anticipate that there would be any considerable additional sum available in respect of 1913 beyond what had already been paid, and that any balance in their hands in respect of that year had not been allocated for medical remuneration. Out of the money received by the garnishees in February, 1914, certain payments on account were made to the various panel doctors in Manchester other than Dr. Sweeny on April 30, 1914, in respect of the first quarter of 1914 ending on March 31, and a similar payment would have been made to Dr. Sweeny on that date, amounting to 28*l.*, but for the service of the garnishee order nisi.

At the trial of the issue Rowlatt J. came to the conclusion that the garnishees had on April 9, 1914, moneys in their hands, undistributed, available for medical benefit for 1913 and the first quarter of 1914, and he therefore held that there was a debt owing or accruing due from the garnishees to Dr. Sweeny on April 9, 1914, which could be attached under Order XLV., r. 1, notwithstanding that as a matter of calculation the exact share payable to him might not have been ascertained at that date, and that there was no principle of public policy preventing the attachment of the debt; and he made an order (according to the certificate of the Associate the order not having been drawn up) "that it be referred to the Master to certify in what amount the said garnishees are indebted, and that upon the amount being so

C. A. 1915

O'DRISCOLL v. MANCHESTER INSURANCE COMMITTEE.

certified the garnishees shall forthwith pay the same or so much thereof as may be sufficient to satisfy the judgment debt and costs to the plaintiffs."

The matter thereupon came before Master Chitty, who, after hearing evidence, certified on February 8, 1915, "that the garnishees are indebted in the sum of 103*l.* 6*s.*," and "that this amount does not necessarily represent the whole amount of the said indebtedness, but is an amount up to which it was able to be ascertained and proved before me at the time of the inquiry." This sum of 103*l.* 6*s.* represented 48*l.* due for 1913, and 55*l.* 6*s.* due for 1914 down to April 9, the date of the garnishee order nisi.

The garnishees appealed to the Court of Appeal from the order of Rowlatt J., and they also appealed to the Court of Appeal from the order of Master Chitty, and the two appeals were directed to come on together.

Clavell Salter, K.C., and *R. A. Wright*, for the garnishees. The appellants do not raise any question of public policy. The only question is whether on April 9, 1914, there was a "debt owing or accruing" from the garnishees to Dr. Sweeny. Under the agreements entered into between the garnishees and Dr. Sweeny the latter was only entitled to a certain proportion of the panel fund when the amount of that fund had been ascertained. The amount of that fund for 1913 had not been ascertained on April 9, 1914. Nor indeed had it been ascertained at the date of the inquiry before Master Chitty. Until the panel fund is ascertained there is no "debt." There are no data for ascertaining the sum due to Dr. Sweeny. Though the Insurance Commissioners keep the Insurance Committee in funds for the purpose of making the necessary payments to the doctors, until there has been an appropriation by the committee to the panel fund there is no debt ascertained or ascertainable. Probably something may become due to Dr. Sweeny, but on the other hand it may be found that nothing is due. The amount of the debt must have been ascertained at the date of the garnishee order nisi, though it may not be payable in praesenti. The probability that a debt may arise is not sufficient. For instance, the income arising

from a fund vested in trustees is not attachable as a debt owing or accruing from the trustees to the cestui que trust until the income is in the hands of the trustees: *Webb* v. *Stenton*. (1) In *Booth* v. *Trail* (2) the sum for retired pay had already accrued due. A claim against an insurance company on a fire policy, before it is settled, is not attachable, the damages being unliquidated: *Randall* v. *Lithgow* (3); nor is a claim on a bond where the amount of the liability would have to be assessed by a jury: *Johnson* v. *Diamond*. (4) In *Jones* v. *Thompson* (5), which was also a case of unliquidated damages, Wightman J. said, according to the *Law Journal* report, that "there must be a debt perfected." The distinction between a debt and unliquidated damages is that the amount of the one is ascertained, whereas the amount of the other is not. Rent cannot, before it is payable, be attached, notwithstanding the provisions of the Apportionment Act, 1870: *Barnett* v. *Eastman* (6) There Day J. said: "It must be debitum—that is, due. It must be a debt, the time for payment of which, although it is future, will certainly arrive." With regard to the cases relied upon by the plaintiffs in the Court below, in *Tapp* v. *Jones* (7) there was an ascertained debt, though it was not payable at the date of the garnishee order nisi. In *Nash* v. *Pease* (8) the annuity to the testator's widow for the maintenance of herself and her infant son was ascertained, and the Court ordered an inquiry as to the proper sum to be allowed for the maintenance of the son, the residue of the annuity to be attached to answer the judgment debt due from the widow. In *Edmunds* v. *Edmunds* (9) the fees payable to a person holding the offices of public vaccinator and registrar of births were held to be "debts" when earned. There the debt was of an ascertained amount. There was therefore no debt owing or accruing from the garnishees to Dr. Sweeny within the meaning of Order XLV., r. 1, on April 9, 1914. The order of the learned judge at any rate was wrong because it substitutes the Master

(1) (1883) 11 Q. B. D. 518.
(2) (1883) 12 Q. B. D. 8.
(3) (1884) 12 Q. B. D. 525.
(4) (1855) 11 Ex. 73.
(5) (1858) 27 L. J. (Q.B.) 234; E. B. & E. 63.
(6) (1898) 67 L. J. (Q.B.) 517.
(7) (1875) L. R. 10 Q. B. 591.
(8) (1878) 47 L. J. (Q.B.) 766.
(9) [1904] P. 362.

C. A. 1915

O'DRISCOLL v. MANCHESTER INSURANCE COMMITTEE.

for the Insurance Committee as the authority to determine the sum payable to the doctor; and also because it directs payment "forthwith," thus accelerating the time for payment. [*Horsley* v. *Cox* (1) and *Daniel* v. *M'Carthy* (2) were also referred to.]

Upon the appeal from the order of Master Chitty,

T. Scanlan (*G. Cave, K.C.*, and *Trickett* with him), for the plaintiffs, took the preliminary objection that the appeal lay to the Divisional Court and not to the Court of Appeal. This is not a reference to the Master for inquiry or report under s. 13 of the Arbitration Act, 1889 (52 & 53 Vict. c. 49). In that case the matter comes again before the judge, who may adopt the report or vary it. It is a reference under s. 14 (*c*) of the Act of a question which consists wholly or in part of a matter of account. Applying the language of Collins M.R. in *Fraser* v. *Fraser* (3), this is "a reference within the statutory provisions as to references contained in the Judicature Acts and ss. 13 to 17 of the Arbitration Act, 1889, in which case any appeal would have to be made to the Divisional Court." *Fraser* v. *Fraser* (No. 2) (4), *Wynne-Finch* v. *Chaytor* (5), and *Cox* v. *Bowen* (6) show that the appeal lies to the Divisional Court. It is not like the case of *Radam's Microbe Killer Co.* v. *Leather* (7), where there had been an assessment of damages before the under-sheriff and a jury in an action in the High Court, and it was held that an application for a new trial must be made to the Court of Appeal. Nor is it like the case of *Dunlop Pneumatic Tyre Co.* v. *New Garage and Motor Co.* (8), where there was a reference of the amount of damages to the Master under Order xxxvi., r. 57, and it was held that an appeal lay direct to the Court of Appeal. That rule treats the finding of the Master as equivalent to the finding of a jury, and judgment is to be entered thereupon. In a garnishee issue no judgment is entered.

Clavell Salter, K.C., and *R. A. Wright*, for the garnishees.

(1) (1869) L. R. 4 Ch. 92.
(2) (1857) 7 Ir. C. L. R. 261.
(3) [1904] 1 K. B. 56, at p. 58.
(4) [1905] 1 K. B. 368.
(5) [1903] 2 Ch. 475.
(6) [1911] 2 K. B. 611.
(7) [1892] 1 Q. B. 85.
(8) [1913] 2 K. B. 207.

The order of Rowlatt J. shows that he did not refer the matter under s. 13 of the Arbitration Act, 1889, to the Master to report; nor was it a reference under s. 14 for trial by the Master. In the latter case the referee tries the matter referred to him and decides it on his own authority and the judge is functus officio. In referring the question to the Master the learned judge was not acting under any statutory authority. He could only have been acting under the inherent jurisdiction of the Court to order an issue to be tried by the Master, but if so he still keeps control over the matter for the purpose of deciding the issue, and the finding of the Master is part of the judge's order, and an appeal from the Master's certificate lies to the Court of Appeal. The learned judge had to try the issue under Order XLV., r. 4, for the information of the Master before whom the garnishee proceedings are pending, and who has to decide whether the garnishee order nisi shall be made absolute. He may or may not have had power to order the Master to try parts of the issue, but he had no jurisdiction to order the garnishees to pay whatever the Master certified to be due. It must be taken therefore that the Master's certificate is incorporated in the learned judge's order. The appeal therefore is properly brought to this Court.

G. Cave, K.C., and *T. Scanlan* (*Trickett* with them), for the plaintiffs, were not called upon to argue the appeal from the order of Rowlatt J.

SWINFEN EADY L.J. This is an appeal from the decision of Rowlatt J. on the trial of a garnishee issue as to whether on April 9, 1914, the garnishees, the Insurance Committee, were indebted to the judgment debtor in any and what sums. The learned judge decided that there was a debt owing or accruing from the Insurance Committee to the judgment debtor. A further question was raised before the learned judge whether, assuming that there was a debt owing or accruing, public policy prevented the debt being attached. The learned judge held that there was no rule of public policy preventing an attachment, and there is no appeal from that part of the judgment. The only question

C. A. 1915

O'DRISCOLL v. MANCHESTER INSURANCE COMMITTEE.

Swinfen Eady L.J.

therefore which we have to determine is whether there was on April 9, 1914, the date when the garnishee order nisi was obtained, a debt owing or accruing from the Insurance Committee to Dr. Sweeny.

Dr. Sweeny was a panel doctor, and had acted as such since January, 1913. He made three contracts with the Insurance Committee, the first in January, 1913, expiring on April 14, 1913; the second on April 11, 1913, expiring on July 14, 1913; and the third on July 17, 1913, expiring on January 14, 1914. The medical year for insurance therefore terminated on January 14, 1914. By the first contract he agreed to treat insured persons in the area of the Manchester Insurance Committee on the terms set out in the scheme accompanying the circular letter of the clerk to the committee dated January 7, 1913. The circular letter stated that the committee were prepared to make the following arrangements with the doctors for the provision, in accordance with the Act and Regulations of the Commissioners, of medical benefit to insured persons in their area, and domiciliary treatment of such persons suffering from tuberculosis. The first two paragraphs of the scheme are the material ones. [The Lord Justice read the paragraphs.] Those were the material terms of the contract for the first three months of 1913, and they contain a positive undertaking by the committee to deal with the sums available in such a way that a doctor was to have his share of the moneys in accordance with a scale of fees to be agreed upon between the Insurance Committee and a committee of panel doctors. The liability of the committee was limited to the amount of the fund available for payment of the panel doctors. There was a contractual liability to pay out of a particular fund a sum which was incapable of being ascertained until some future time. The second and third contracts were, so far as material to this case, in similar terms to the first one.

The position therefore of Dr. Sweeny for 1913 was that he agreed to give his services as a panel doctor upon the terms of being paid remuneration as I have stated. The National Health Insurance (Administration of Medical Benefit) Regulations, 1912, which were in force at that time provided as follows: [The Lord

Justice read art. 39, art. 40, clauses 2, 3, and art. 42.] The Insurance Committee adopted a system of payment by attendance, and art. 40, clause 3, determines the share which each doctor was entitled to receive for his attendances out of the panel fund. By art. 42 the practitioners were to render quarterly accounts, and as soon as might be after the receipt of the account the committee "shall pay" the practitioner a certain sum in advance of the amount due and the balance as soon as might be after the expiration of the year. These Regulations have statutory force.

When the garnishee order nisi was served Dr. Sweeny had completed one year's service on January 14, 1914, and had received four quarterly payments on account amounting in all to 257*l.* He had rendered accounts showing that, according to his attendances, a sum of about 556*l.* would be due to him. That sum represented the amount of work done by him according to the scale on which the doctors were charging. It by no means followed that it represented the sum which he would be paid. It merely represented his proportionate share of the panel fund when it was ascertained, and not a sum of money due to him. The payment for the work done by the other doctors on the panel would have to be calculated upon the same basis for the purpose of ascertaining their proportionate shares of the fund. Dr. Sweeny had completed the whole of the work for 1913 necessary to entitle him to payment for his services for that year. He had received payments on account, but it would be some time before the accounts were settled and the balance due to him for 1913 ascertained. There was, however, no contingency which could happen to deprive him of his right to payment on the figures being finally adjusted. The case has been argued on the basis of fact, which it was agreed was the true basis, that the Insurance Committee were kept in funds for making the necessary payments. The Insurance Committee received from time to time payments of large sums on account from the Insurance Commissioners, and when they received all the funds for the year they would be in a position to determine the amount payable to each doctor.

In those circumstances I am of opinion that on April 9, 1914,

C. A. 1915

O'DRISCOLL v. MANCHESTER INSURANCE COMMITTEE.

Swinfen Eady L.J.

there was a debt owing or accruing from the Insurance Committee to the panel doctors. It was not presently payable, the amount not being ascertained, but it was a debt to which the doctors were absolutely and not contingently entitled. The only question was as to the amount of the debt, the debt not being payable until the amount had been ascertained.

I now come to the first quarter of 1914. The original year included in Dr. Sweeny's agreements ended on January 14, 1914, but we are told that in 1914 a change was made, and that the medical year began on January 1, 1914, and ended on December 31. The first quarter therefore expired on March 31. On April 9 Dr. Sweeny would be entitled to a payment on account of his services for that quarter. The Insurance Committee were bound to make such a payment. By art. 37 of the National Health Insurance (Medical Benefit) Regulations (England), 1913, which are applicable to Dr. Sweeny's contract of January, 1914, "As soon as may be after the expiration of each quarter the committee shall pay to each practitioner such sum as may be agreed between the committee and the panel committee in advance of the amount due to him." There is therefore a statutory obligation on the committee to pay to the panel doctors a quarterly sum on account, the amount of which is to be determined as therein provided, and no garnishee proceedings can affect the right of those persons to determine the amount. That being so, Dr. Sweeny had on April 9, 1914, become entitled to a payment on account for work done, and that right was not subject to be divested by any contingency. Rowlatt J. held that on that date there was a "debt owing or accruing" from the Insurance Committee to Dr. Sweeny, though not presently payable.

It is contended, however, that there cannot be a "debt" until the amount has been ascertained, and in support of this contention cases have been cited to us where it was attempted to attach unliquidated damages. But in such cases there is no debt at all until the verdict of the jury is pronounced assessing the damages and judgment is given. Here there is a debt, uncertain in amount, which will become certain when the accounts are finally dealt with by the Insurance Committee. Therefore there was a

"debt" at the material date, though it was not presently payable and the amount was not ascertained. It is not like a case where there is a mere probability of a debt, as, for instance, where a person has to serve for a fixed period before being entitled to any salary, and he has served part of that period at the time the garnishee order nisi is served. In such a case there is no "debt" until he has served the whole period. There is another class of cases where the attempt has been made to attach income arising from a fund vested in trustees for a cestui que trust. In such a case until the trustees receive the income there is no debt owing or accruing from the trustees to the cestui que trust, and consequently there is nothing which can be attached to answer a judgment obtained against the cestui que trust. That consideration does not apply to the present case because it is admitted that the Insurance Committee had at all material times ample funds in their hands for the purpose of paying what might be found to be due to Dr. Sweeny. In my opinion there was a debt owing or accruing from the Insurance Committee to Dr. Sweeny in respect of 1913 and the first quarter of 1914, and the decision of Rowlatt J. is right.

Then it is said—and perhaps the form of the Associate's certificate lends some colour to the contention—that the fact that a debt is attached by means of garnishee proceedings cannot have the effect of substituting a new method of ascertaining the amount of the debt or of accelerating the date of payment. I accede to both those arguments. It is for the Insurance Committee in conjunction with the Medical Committee to ascertain the amount payable to the doctors, and it was not intended by the order which the learned judge made to set up a new tribunal to ascertain the amount of the debt or to accelerate the date of payment. It is true that according to the Associate's certificate the learned judge referred it to the Master to certify in what amount the garnishees were indebted, and upon the amount being so certified the garnishees were forthwith to pay the same or so much thereof as might be sufficient to satisfy the judgment debt and costs to the plaintiffs. It is said that the effect of that order is to substitute a new tribunal, namely, the Master, for the Insurance Committee for the purpose of ascertaining the amount

C. A. 1915

O'DRISCOLL v. MANCHESTER INSURANCE COMMITTEE.

Swinfen Eady L.J.

of the debt, and to accelerate the date of payment by providing for payment "forthwith." In my opinion that was not intended, and it would not be right to make an order having that effect. I understand that this is the real objection of the Insurance Committee to the order. The judgment creditor who has obtained a garnishee order is in no better position in these respects than the judgment debtor. We will therefore consider the form of the order which ought to be made in this case, as it may constitute a precedent. Subject to this the appeal fails and must be dismissed.

There remains the appeal from the order of Master Chitty. In my opinion the appeal lies to the Divisional Court and not to this Court. Whether the order of Rowlatt J. is regarded as a direction to the Master or as a reference under s. 14 of the Arbitration Act, 1889, to try an issue, the appeal from the order of the Master lies to the Divisional Court. The case is within the decision in *Wynne-Finch* v. *Chaytor*. (1) Strictly, therefore, the appeal is not before us. But we have heard what the parties have to say upon it, and no point of substance arises beyond those which I have dealt with in my judgment upon the main question. We are told that 48*l*. is due in respect of 1913, and 55*l*. 6*s*. in respect of the first quarter of 1914, making a total of 103*l*. 6*s*. That is the sum, as I understand, which has been already ascertained by the committee as being due to Dr. Sweeny for those periods. The appeal will be dismissed.

PHILLIMORE L.J. I am of the same opinion, and have little to add. Under the three agreements of 1913, which I presume were made with all the panel doctors, the Insurance Committee came under an obligation to each doctor to pay to him his share of the pool, that is to say, of the fund remitted by the Insurance Commissioners to the Insurance Committee for the purpose of paying the doctors in accordance with a system of payment arrived at by agreement between the committee and the representatives of the doctors. The committee were also bound under the Regulations to make these payments, and they were further bound by the Regulations to make quarterly

(1) [1903] 2 Ch. 475.

payments on account. With regard to the first quarter of 1914 the Insurance Committee were possibly under a somewhat higher obligation. They were not merely under a contractual obligation to make a payment at the end of the year, but they were under a further obligation, based upon a contract embodying the Regulations of 1913, to make not only a final payment after the expiration of the year, but also quarterly payments on account. Therefore both under the Regulations which have statutory force and under a contract incorporating the Regulations there was a debt due from the committee to Dr. Sweeny. No doubt these debts were not presently payable, and the amounts were not, on April 9, 1914, ascertained in the sense that no one could say what the result of the calculations would be, but it was certain on that date that a payment would become due from the committee to the doctors out of the balance of the moneys in the hands of the committee for 1913, and that there was a provisional payment due to the doctors for the first quarter of 1914. Therefore for each of those periods there was a debt owing or accruing from the Insurance Committee to Dr. Sweeny, and it is well established that a debt so payable, though solvendum in futuro, is attachable under Order XLV., r. 1. It is not like the case of unliquidated damages which are not a debt until judgment. Directly the learned judge came to the conclusion that there was a balance, though of unascertained amount, in the hands of the Insurance Committee on April 9, 1914, for payment to the doctors for the year 1913, and that there was money in their hands for making a provisional payment to the doctors for the first quarter of 1914, he was bound to find that there were debts owing or accruing due from the Insurance Committee to Dr. Sweeny. As to the form of the order, it will be sufficient if the order which we make follows the canons laid down by Swinfen Eady L.J., namely, that the judgment creditors ought not to be placed in any better position as against the Insurance Committee with regard to the mode of ascertaining the sum due and the date of payment than the judgment debtor himself.

With regard to the appeal from the Master, I can understand the difficulty which has arisen from the form of the order made. I think, however, it is clear that Rowlatt J. did not intend

C. A. 1915

O'DRISCOLL v. MANCHESTER INSURANCE COMMITTEE.

Phillimore L.J.

himself to give any decision as to the sum due to the doctor. He did not intend that the Master should report to him and that he should then give judgment upon the report. It was therefore not a reference under s. 13 of the Arbitration Act, 1889. The learned judge found a liability in the Insurance Committee, and he referred it to the Master to ascertain the amount with an order for payment of the amount so found to be due. Whether that was a reference under his general jurisdiction or under s. 14 of the Arbitration Act, 1889, the appeal from the Master's decision lies to the Divisional Court. There are one or two exceptional cases, as, for instance, *Dunlop Pneumatic Tyre Co.* v. *New Garage and Motor Co.* (1) and *Radam's Microbe Killer Co.* v. *Leather* (2), where the appeal lies from the inferior officer or tribunal to the Court of Appeal. The present case does not come within any such exceptional class. We therefore dismiss the appeal upon the ground that it is brought to the wrong Court, but at the same time we have heard enough of it to know that there is no substance in it, and any objection to the order which it sought to raise will be met by our moulding the form of the order on the first appeal.

BANKES L.J. I agree. When the garnishee order nisi came on for hearing the garnishees disputed the existence of any debt, and accordingly an order was made for the trial of an issue. The issue as drawn up stated that the plaintiffs affirmed and the garnishees denied that on April 9, 1914, the garnishees were indebted to the judgment debtor in the sum of 225*l.* 15*s.* 6*d.*, or, alternatively, if so indebted, that the amount due was in law capable of being attached. The question whether the garnishees were "indebted to the judgment debtor" means whether or not there was a debt owing or accruing to the judgment debtor at the date of the service of the garnishee order nisi.

It is well established that "debts owing or accruing" include debts debita in praesenti solvenda in futuro. The matter is well put in the Annual Practice, 1915, p. 808: "But the distinction must be borne in mind between the case where there is an existing debt, payment whereof is deferred, and the case where

(1) [1913] 2 K. B. 207. (2) [1892] 1 Q. B. 85.

both the debt and its payment rest in the future. In the former case there is an attachable debt, in the latter case there is not." If, for instance, a sum of money is payable on the happening of a contingency, there is no debt owing or accruing. But the mere fact that the amount is not ascertained does not show that there is no debt. In the present case there was on April 9, 1914, a debt debitum in praesenti but solvendum in futuro. It is not necessary to say exactly at what moment of time the debt was created. In 1913 Dr. Sweeny acted as panel doctor under three agreements with the Insurance Committee. The method of remuneration was based upon the system of payment by attendance, and in the agreement for 1914 there was a scale of payment for each attendance. It is not necessary to decide whether a debt arose in respect of each attendance, but it is clear that a doctor cannot say that a debt has arisen unless he has performed his part of the agreement. Dr. Sweeny fulfilled that condition, and a debt arose though the amount of it was not ascertained on April 9, 1914, and was not then payable. Still there was none the less a subsisting debt on that date, and in my opinion the decision of Rowlatt J. is right. I am not sure that the latter part of his order is expressed as he intended it should be. It is clear that the judgment creditor is not entitled to have the date of payment of the debt expedited. He is only entitled to stand in the shoes of the judgment debtor. If the order as expressed has the effect of expediting the date of payment, I think it is wrong. We will consider what the proper form of order should be. In my opinion the appeal fails.

With regard to the interlocutory appeal from the order of Master Chitty I agree that the appeal ought to have been brought to the Divisional Court and not here.

June 30. Swinfen Eady L.J. read the following form of order: "It appearing that the amount of the debt owing from the above-named garnishees to the judgment debtor will not in any event be sufficient to satisfy the said judgment debt and costs of 255*l.* 15*s.* 6*d.*; and it appearing by the certificate of Master Chitty, dated the 8th day of February, 1915, that of the debt

C. A. 1915

O'DRISCOLL v. MANCHESTER INSURANCE COMMITTEE.

Swinfen Eady L.J.

owing from the garnishees to the judgment debtor on the 9th day of April, 1914, the sum of 103*l.* 6*s.* has become payable; let the garnishees pay the sum of 103*l.* 6*s.* to the plaintiffs forthwith, and let the garnishees pay to the plaintiffs any further sums which are now or may hereafter become payable in respect of the debt owing on the 9th day of April, 1914, from them to the judgment debtor when and so soon as the amount thereof shall have been ascertained and become payable pursuant to the National Health Insurance Regulations for the time being in force. Liberty to apply at chambers."

We have also settled a skeleton form of order for an inquiry in chambers, for use in future cases where it appears that there is a debt, but that the amount payable has not been determined when the garnishee proceeding is disposed of.

"An inquiry whether, in respect of the debt owing by the garnishees to the judgment debtor on the day of 19 , any and what amount has been ascertained and determined to have become payable pursuant to the National Health Insurance Regulations for the time being in force.

"Order payment of any sum which has so become payable.

"Liberty to apply." (1)

The inquiry should only be proceeded with when the creditor has reason to believe that some amount has been duly determined to have become payable.

Appeals dismissed.

Solicitor for plaintiffs: *H. Z. Deane.*

Solicitors for garnishees: *Withers, Bensons, Birkett & Davies.*

(1) See Annual Practice, 1916, p. 1662, Form 39A.

W. F. B.

In re PILET.

Ex parte A. TOURSIER & CO. AND BERKELEY AND ANOTHER.

1915
July 12.

Deed of Arrangement—Creditor—Recital of Debt—Trustee—Right of Trustee to deny Existence of Debt—Deeds of Arrangement Act, 1914 (4 & 5 *Geo.* 5, *c.* 47), *s.* 23.

By a deed of arrangement for the benefit of creditors, which recited that certain persons were creditors of the assignor for the sums set opposite to their names in a schedule to the deed, the assignor conveyed to a trustee, who was a party to the deed, certain properties upon trust to pay thereout to the creditors named the sums specified in the schedule. Two of the persons named in the schedule as creditors, one of whom had executed, and the other of whom had assented to, the deed, had been creditors of the assignor for the sums specified, but their debts had previously to the execution of the deed been discharged by the bankruptcy of the assignor, in which they had refrained from proving, and no fresh consideration had subsequently been given for the sums stated in the deed to be owing to them :—

Held, that, the deed being admitted to be one for the benefit of creditors generally, the trustee was entitled to obtain a declaration under s. 23 of the Deeds of Arrangement Act, 1914, that the persons in question were not in fact creditors of the assignor, notwithstanding that the trustee was himself a party to the deed in which they were stated to be creditors.

APPEALS from the county court of Surrey holden at Kingston-on-Thames.

On March 19, 1910, a receiving order was made against François Louis Pilet. At that date he was indebted to A. Toursier & Co. in the sum of 966*l.* 3*s.* and to G. A. Berkeley in the sum of 557*l.* 18*s.* 9*d.* Both of these creditors refrained from proving in the bankruptcy, and did not obtain the benefit of a scheme of composition which was prepared by the debtor and approved by the Court. On June 10, 1910, the receiving order was discharged. In August, 1910, Pilet gave to each of these creditors a promissory note for the above-mentioned sums respectively. No new consideration was given for the promissory notes.

In August, 1912, G. A. Berkeley being then dead, his executors obtained a judgment in the High Court against Pilet for the

1915

PILET, *In re.* A. TOURSIER & CO. AND BERKELEY, *Ex parte.*

amount of the promissory note, and subsequently they issued a bankruptcy petition founded on the judgment.

On November 26, 1912, Pilet executed a deed of arrangement. The deed was made between Pilet (thereinafter called the assignor) of the first part, Salaman (thereinafter called the trustee) of the second part, certain persons (thereinafter called the committee) of the third part, and "the companies and persons who or whose attorneys or agents on their behalf execute or otherwise accede to these presents and whose names appear in Part I. of the first schedule hereto" of the fourth part. The deed recited that "whereas the assignor is indebted to the several companies and persons whose names are set out in the first column of Part I. of the first schedule hereto in the several sums set opposite to their respective names in such schedule and the persons whose names are set out in the first column of Part II. of such schedule claim to be creditors of the assignor for the several sums set opposite to their respective names in such schedule but the assignor disputes such claims And whereas the creditors whose names are set out in the second schedule hereto have presented petitions in bankruptcy against the assignor . . . . And whereas the assignor has requested the said creditors parties hereto of the fourth part to refrain from taking or continuing proceedings against him for the recovery of the money so owing as aforesaid and to withdraw the said petitions and also to give him time for payment which the creditors have agreed to do in consideration of the assignor giving to the trustee such rights and powers on their behalf as are hereinafter contained . . . . Now this indenture witnesseth that . . . . the assignor as beneficial owner hereby assigns unto the trustee" the rents, interest, and annual income arising from certain properties "to hold the same unto the trustee upon trust to collect and receive the same . . . . and out of the moneys so collected received or recovered" to pay the expenses of collection, the costs of the trustee, and certain other costs "and then to pay to the said creditors parties hereto of the fourth part the several sums set opposite to their respective names in Part I. of the first schedule hereto as and when the moneys so to be received or recovered by the trustee as aforesaid are received and recovered by him . . . .

And it is hereby further provided and agreed that the parties of the fourth part shall not before the expiration of three calendar months from the date hereof take or continue any proceedings to enforce the payment of the sums due to them as aforesaid . . . ."

The names of A. Toursier & Co. and the executors of Berkeley & Co. were in Part I. of the first schedule, the amount of their debts being stated to be 966*l.* 3*s.* and 557*l.* 18*s.* 9*d.*

The deed was executed by Pilet, Salaman, and A. Toursier & Co. The executors of Berkeley assented to the deed, having at the request of the debtor withdrawn their bankruptcy petition. It was also alleged that they had given time for payment.

The deed was duly registered on December 2, 1912.

In January, 1915, the trustee was in a position to pay a dividend under the deed. On April 1, 1915, the trustee applied to the registrar of the Kingston-on-Thames County Court under s. 23 of the Deeds of Arrangement Act, 1914 (1), for a declaration as to whether in the above circumstances A. Toursier & Co. and the executors of Berkeley were creditors under the deed, or, alternatively, were creditors entitled to the benefit of the composition payable under the deed. The registrar made an order declaring that A. Toursier & Co. and the executors of Berkeley were not creditors of Pilet or entitled to the benefit of the payments to be made under the deed.

A. Toursier & Co. and the executors of Berkeley appealed.

E. W. Hansell, for the appellants. The deed constitutes a new and valid contract to pay the sums stated in the schedule to the

(1) Deeds of Arrangement Act, 1914 (4 & 5 Geo. 5, c. 47), s. 23: "Any application by the trustee under a deed of arrangement, which either is expressed to be or is in fact for the benefit of the debtor's creditors generally, or by the debtor or by any creditor entitled to the benefit of such a deed of arrangement, for the enforcement of the trusts or the determination of questions under it, shall be made to the Court having jurisdiction in bankruptcy in the district in which the debtor resided or carried on business at the date of the execution of the deed: Provided that any question as to whether any person claiming to be a creditor entitled to the benefit of a deed of arrangement is so entitled may, subject to rules made under this Act, be decided either by the Court having such jurisdiction as aforesaid or by the High Court."

1915

PILET, *In re.* A. TOURSIER & CO. AND BERKELEY, *Ex parte.*

deed to be owing to the appellants. A contract under seal imports a consideration. It is therefore immaterial that the debts were discharged by the bankruptcy in 1910. Under the deed each creditor agrees that all the others are creditors and that the amount of their debts is as stated in the deed. In the case of Berkeley's executors there was in fact a fresh consideration for the debt, for they gave time for payment and also agreed to withdraw their bankruptcy petition. Secondly, this application for a declaration that the appellants are not creditors is made by the trustee, who is a party to the deed. It is not denied that the deed is one for the benefit of the creditors generally, but the appellants are stated in the deed to be creditors and it is not open to the trustee to allege that persons for whom he has agreed to act as trustee are not in fact creditors. In *Lancaster* v. *Elce* (1) Romilly M.R. said: "When the deed has been executed by a creditor, he becomes one of the cestuis que trust, and the deed cannot be affected, except in a suit to rectify it." It is true that in that case the deed included in terms not only certain named creditors but all other creditors, and the deed provided that certain steps should be taken for the verification of debts. The present deed contains no machinery for that purpose, but the trustee by executing the deed has accepted the truth of the statement that the appellants are creditors. If any grounds exist for the rectification of the deed, the trustee must take the proper steps to have the deed rectified, but he cannot at one and the same time apply under s. 23 as trustee of the deed and allege that the appellants are not in fact creditors although they are described as such in the deed. Thirdly, the trustee by executing the deed is estopped from denying the statement in the deed that the appellants are creditors.

Clayton, K.C., and *Tindale Davis*, for the trustee. The appellants are not creditors of the assignor, for the effect of the bankruptcy was to discharge their debts, and there was no contract for good consideration creating fresh debts: *Ex parte Barrow*. (2) The statement in the deed that the appellants are creditors is the statement of the assignor, and it does not bind the trustee, whose duty it is to administer the trusts of the deed

(1) (1862) 31 Beav. 325. (2) (1881) 18 Ch. D. 464.

for the benefit of all persons who really are the creditors of the assignor. An estoppel to which a bankrupt may have subjected himself does not prevail against the trustee in bankruptcy: *In re Van Laun* (1), per Bigham J.; and the same principle applies here, for by r. 16 of the Rules made under the Deeds of Arrangement Act, 1914, the application made in this case is deemed to be a proceeding in bankruptcy. The trustee is bound to take the proper steps to ascertain whether the particular persons named in the deed as creditors really are creditors. In *Coles* v. *Turner* (2) Blackburn J. said: "In every case where the trust is, to distribute a fund among a particular class,—whether creditors or any other class,—the trustee must, in the absence of any express provision on the subject in the deed, determine in some way whether he will act on the supposition that the person claiming benefit under the deed is or is not of that class."

Hansell in reply referred to *Wild* v. *Tucker*. (3)

HORRIDGE J. This is an appeal from an order made by the registrar of the county court of Surrey holden at Kingston-on-Thames. [The learned judge read s. 23 of the Deeds of Arrangement Act, 1914, and continued:] In this case the registrar acted as an officer of the Court having jurisdiction in bankruptcy in the district in which the debtor resided or carried on business at the date of the execution of the deed. By r. 16 of the Rules made under the Deeds of Arrangement Act, 1914, "All applications, other than applications under section 7 of the Act," (s. 7 of the Act is the section which deals with extending the time for registration of the deed and with the rectification of the registration of the deed by the High Court or a judge in chambers) "which by this Act or these Rules are directed or allowed to be made to the High Court or the county court having jurisdiction in bankruptcy in the district in which the debtor resided or carried on business at the date of the execution of the deed shall be deemed to be proceedings in bankruptcy." Now, under those provisions the trustee under a deed dated

(1) [1907] 1 K. B. 155, at p. 163.
(2) (1866) L. R. 1 C. P. 373, at p. 380.
(3) [1914] 3 K. B. 36.

1915

PILET, *In re.* A. TOURSIER & CO. AND BERKELEY, *Ex parte.*

Horridge J.

November 26, 1912, applied to the Court having jurisdiction in bankruptcy for a declaration as to whether the appellants, who are a firm called A. Toursier & Co., and the executors of a man named Berkeley, are creditors entitled to the benefit of a composition which is to be paid under the deed.

No question arises on this appeal as to the amount of either of the alleged debts. There is one question common to both cases, and it is said that besides that question there is a further question in Berkeley's case. The question common to both cases is whether upon the true construction of this deed a new right was created against the trustee by the fact that the trustee executed that deed. In order that the Court may have jurisdiction to deal with the matter it is necessary to decide in the first place whether the deed is a deed for the benefit of creditors generally; and the whole of my judgment in this case must be taken to be founded on the fact that this is a deed for the benefit of creditors generally which Mr. Hansell has admitted as the basis of his argument. This means that any creditor, if he was not already mentioned in the schedule to the deed, would have the right to come in and join in taking the benefit of the trusts of the deed. The deed provides that the moneys in the hands of the trustee shall, after being applied to making certain payments, be applied "to pay to the creditors parties hereto of the fourth part the several sums set opposite to their respective names in Part I. of the first schedule hereto as and when the moneys so to be received or recovered by the trustee as aforesaid are received and recovered by him." In the first part of the first schedule the names of the appellants appear as creditors with the sums they are now claiming set opposite to their names in the schedule. It is contended on their behalf that when the trustee executed the deed he entered into a trust to pay to those two creditors, so far as the assets are available, the amounts set opposite their names in the schedule; and that it does not lie in the mouth of the trustee to say the appellants are not real creditors, because the trustee has executed this deed in which the appellants are stated to be creditors. I do not think that is the true view of the deed. I think the true view of the deed is that the names of the various persons and firms and the amounts

owing to them were merely inserted in the schedule as statements of the debtor as to the persons who he thought were his creditors, and as to the amounts which he thought he owed to them. The trustee's duty, it seems to me, on signing the deed is to ascertain what persons really are creditors; and the only trust created as against him is a trust for the benefit of creditors generally. The fact that certain creditors have been inserted by the debtor in the schedule does not seem to me to be in any way a new consideration given to the debtor, or an estoppel operating either against the trust funds or against the trustee himself. The primary object of the deed is to distribute the assets among creditors. The duty of the trustee is to ascertain who those creditors are, and it is perfectly obvious the appellants are not creditors at all. They are only persons who at one time had been creditors, but whose debts had been discharged. Therefore, in my view, the decision of the registrar was quite right.

A case of *Lancaster* v. *Elce* (1) was cited to us. It is only necessary to say with regard to that case the trustees' duty there was not to admit a person as a creditor until they had been satisfied that he really was a creditor, and there was machinery provided by which the trustees were to satisfy themselves of that fact. The whole judgment may be summed up in the language of the Master of the Rolls (2), where he says: "The trustees might have required any proof they thought fit of the plaintiffs' debt before they were permitted to execute the deed; but the trustees, having allowed the plaintiffs to execute it, cannot now exclude them." There is no such provision in this case, and therefore it is the duty of the trustee to see that the various persons described as creditors are really creditors in the ordinary way, and thus ascertain whether they come within the purview of the trusts.

In the case of Berkeley's executors it is further said they gave a new consideration which entitles them to consider themselves as creditors apart from the pre-existing debt. The two considerations relied on are (1.) that they gave time, (2.) that they refrained from taking bankruptcy proceedings. Those, in

(1) 31 Beav. 325. (2) 31 Beav. at p. 329.

1915

PILET, *In re.* A. TOURSIER & Co. AND BERKELEY, *Ex parte.*

Horridge J.

my opinion, are no considerations whatever. To give time for a real bona fide debt may be one thing, but here everybody knew or must be taken to have known there was no debt at all. The assignor may have thought that he would like to pay the debt because he had promised to do so, but these appellants must be taken to have known what is perfectly clear law, that their debt had been discharged; and an agreement to give time for a discharged debt is not a valid consideration. Similarly, an agreement not to take bankruptcy proceedings, when such bankruptcy proceedings must inevitably have ended in failure, was no consideration either. Therefore I cannot see that the executors of Berkeley stand on any other footing than A. Toursier & Co., and both appeals in my opinion must be dismissed.

ROWLATT J. I agree. Mr. Hansell was bound to admit that the trustee would have to interfere with the names and amounts mentioned in the first part of the first schedule for the purpose possibly of admitting other names and amounts. Apart altogether from creditors who might have been overlooked, he would be bound to interfere in order to admit, if the facts demanded it, the creditors whose names appear in Part II. of the first schedule as persons who claimed to be creditors but whose claims were disputed by the assignor, for there was no provision otherwise for dealing with their claims. Admitting, therefore, that Part I. of schedule 1 may have to be interfered with in that way, it seems to me that the whole argument falls to the ground which seeks to treat the trust to pay those creditors as a specific trust for those persons. The trust compels the Court to construe it in the way in which plain considerations of law and business require it to be construed in deeds of this kind, namely, as a trust to pay real creditors dividends on their real debts. I do not desire to add anything on the second point.

Appeals dismissed.

Solicitors for appellants: *White & Leonard, and Gibson, Usher & Co.*

Solicitor for trustee: *W. B. Glasier.*

F. O. R.

[IN THE COURT OF APPEAL.]

C. A.
1915
July 8, 9, 12.

BRADSHAW *v.* WATERLOW & SONS, LIMITED.

[1914 B. 698.]

Malicious Prosecution — Reasonable and Probable Cause — Corroboration — Question for Jury — Fiat of Attorney-General.

In an action for malicious prosecution the question whether the defendant took reasonable care to inform himself of the facts before he instituted the prosecution ought not to be left to the jury unless there is some evidence of his not having made proper inquiries; and the question whether the defendant honestly believed in the charge which he made ought not to be left to the jury unless there is some evidence of the absence of that belief.

There cannot be an absence of reasonable and probable cause when the Attorney-General has granted his fiat for the prosecution and it is not shown that the facts were put before him unfairly.

Decision of Bray J. affirmed.

Appeal from a decision of Bray J.

The following statement of facts is taken from the judgment of Pickford L.J.

This is an appeal from a judgment of Bray J., by which judgment was entered for the defendants in an action by the plaintiff for malicious prosecution on the ground that there was no evidence of absence of reasonable and probable cause.

The facts were these. The defendants had for some years bought hides—pig skins and Russian skins—from a man of the name of Miller. Miller's manager at one time was his nephew, whose name was Arthur Simmons. The defendants had two employees, the plaintiff and a man of the name of Richards, who had to deal with the skins in the course of their duties. Simmons was dismissed by or received notice from Miller and began business for himself, but was not prosperous. He then asked Miller to take him back, but Miller refused, as he said that Simmons had acted dishonestly while in his service. Soon afterwards Simmons came to the defendants and told them that he had for several years while in Miller's service on Miller's instructions bribed both Richards and the plaintiff to pass skins as of larger measurement and better quality than they really

C. A. 1915

BRADSHAW v. WATERLOW & SONS, LIMITED.

were, and so defraud the defendants for the benefit of Miller, as the defendants paid Miller by measurement. He stated that the bales of Russian skins were opened, the original Russian marks erased and fraudulent marks substituted, and that these skins should have been delivered in the original sealed bales. He also said that the money which was given by him to the plaintiff and Richards was obtained in the following way. Miller opened a fictitious account in his books in the name of James & Co., and drew cheques in favour of James & Co., which he cashed. He then gave the cash to Simmons for the purpose of bribing Richards and the plaintiff. Simmons did not say that the whole of the money which passed through the James & Co. account was used for bribing Richards and the plaintiff, but that cheques in favour of James & Co. were drawn for that purpose, and that there was no genuine business done with James & Co. at all, in fact that the firm did not exist, and that the account was a sham. Simmons also said that the plaintiff, Richards, and he used to go to Miller's house for the purpose of arranging these matters, and that the plaintiff wrote to him to tell him when he was going. Simmons produced one or two letters or post-cards referring to going to Hampstead, where Miller lived. The defendants at once sent for Richards and the plaintiff and told them what Simmons had said. Richards admitted that it was true, but the plaintiff denied it. They were both suspended, and Mr. Gorbold, the manager of the plaintiff's department, examined a number of skins which had come from Miller and should have been checked by the plaintiff. Some of the invoices relating to these skins had been stamped as examined and found correct by the plaintiff. Mr. Gorbold said that he left that part of the work entirely to the plaintiff and did not check it himself, although he had from his position a general supervision over the department. A considerable quantity of the skins so examined by Mr. Gorbold were found to be marked with larger measurements than was correct, and according to the course of business they would be paid for according to the marked measurements when examined and found correct by the plaintiff. The defendants also informed Miller of Simmons' story, and he invited them to examine his books. They were so kept that it was difficult to make out from

them what the transactions between Miller and the defendants had been, but they did show an account in the name of James & Co. When an explanation was required of that account, Miller's son, who had been left by Miller to answer any questions, said that it was the account of a small dealer from whom they occasionally bought skins near Farringdon Market, that he knew him by sight but did not know his address, and could not produce any invoices or receipts or any documents at all relating to any business done with James & Co. No such person in that business could be found in the directory or any book of reference of that kind. The defendants then instituted criminal proceedings against Miller and Bradshaw for offences under the Prevention of Corruption Act, 1906 (6 Edw. 7, c. 34), and also for conspiracy. They were committed for the former offence, but the magistrate refused to commit for conspiracy. It is not easy to understand his position, as, if the former offence had been committed, it had been committed by Miller and the plaintiff acting together and there was prima facie evidence of conspiracy. Miller was tried at the Central Criminal Court and acquitted, and the defendants, thinking it useless after that acquittal to go on with the prosecution against the plaintiff, offered no evidence against him. He then brought this action for malicious prosecution, and, in order to show the grounds on which the defendants acted, put in the depositions which showed that the information which the defendants had consisted of the facts stated above. (See *Walker* v. *South Eastern Ry. Co.* (1)) At the trial Bray J. declined to leave to the jury the questions whether the defendants took reasonable care to inform themselves of the facts before they instituted the prosecution, and whether they honestly believed in the charge they made; held that there was no evidence of absence of reasonable and probable cause; and gave judgment for the defendants.

The plaintiff appealed.

McCall, K.C., and *Abinger*, for the appellant. Bray J. was wrong in withdrawing the case from the jury.

Simmons was an accomplice and a discharged servant and his

(1) (1870) L. R. 5 C. P. 640, 644.

C. A. 1915

BRADSHAW v. WATERLOW & SONS, LIMITED.

evidence should not have been accepted without corroboration. The respondents ought to have made further inquiries before commencing the prosecution: *Lea* v. *Charrington*. (1)

Corroboration which will make it reasonable to prosecute on the evidence of an accomplice must be such as to implicate the accused and warrant a conviction: *Reg.* v. *Farler* (2); *Reg.* v. *Dyke*. (3)

The only suggested corroboration here is the existence of the book in which the alleged fictitious account in the name of James & Co. was kept. But that contained no reference to Bradshaw and was no confirmation of Simmons' evidence against him. Simmons' story therefore was quite uncorroborated. Much of what might have been held to be corroboration in Miller's case was not necessarily corroboration against Bradshaw. See also as to corroboration *Reg.* v. *Stubbs* (4); *Rex* v. *Everest* (5); *Rex* v. *Wilson* (6); *Rex* v. *Brown* (7); *Rex* v. *Blatherwick*. (8)

As to the existence of reasonable and probable cause the earlier cases are summed up in *Panton* v. *Williams*. (9)

The next case in point of date is *Douglas* v. *Corbett* (10), where the application of the rule as stated in *Panton* v. *Williams* (9) was considered by Coleridge J. The rule is that the facts on which the question of reasonable and probable cause depends must be left to the jury, and on the facts found by them it is for the judge to determine whether there is reasonable and probable cause or not: *Lister* v. *Perryman*. (11) Reasonable and probable cause is well defined by Hawkins J. in *Hicks* v. *Faulkner*. (12) Bray J. ought to have left to the jury the questions in *Abrath* v. *North Eastern Ry. Co.* (13), namely, did the defendants take reasonable care to inform themselves as to the facts before they commenced the prosecution; did they honestly believe in the charge they

(1) (1889) 23 Q. B. D. 45, 272.
(2) (1837) 8 C. & P. 106.
(3) (1838) 8 C. & P. 261.
(4) (1855) 25 L. J. (M.C.) 16.
(5) (1909) 2 Cr. App. R. 116, 130; 73 J. P. 269.
(6) (1911) 6 Cr. App. R. 125.
(7) (1911) 6 Cr. App. R. 24, 147.
(8) (1911) 6 Cr. App. R. 281.
(9) (1841) 2 Q. B. 169, 192, 194.
(10) (1856) 6 E. & B. 511, 515.
(11) (1870) L. R. 4 H. L. 521.
(12) (1878) 8 Q. B. D. 167, 171.
(13) (1883) 11 Q. B. D. 79, 440, 444; affirmed (1886) 11 App. Cas. 247.

brought against Bradshaw; and were they actuated by any indirect motive in preferring the charge?

The learned judge was wrong in holding that there was no evidence of the absence of reasonable and probable cause. He should have left the question to the jury: *Brown* v. *Hawkes.* (1) [They also referred to Lord Halsbury's Laws of England, vol. 9, p. 682.]

J. B. Matthews, K.C., and *Brandon*, for the respondents. The question whether an ordinarily reasonable man is justified in prosecuting upon the evidence of an accomplice is different from the question whether there is sufficient corroboration to warrant a conviction: *Dawson* v. *Vansandau.* (2)

[PICKFORD L.J. If the argument against you is sound, then, unless you secured a conviction or the jury returned a perverse verdict, you could never have reasonable and probable cause.]

Yes; it comes to that. None of the authorities support the proposition that the judge must always take the opinion of the jury upon every fact: *Abrath's Case.* (3)

The question whether there is reasonable and probable cause is, when the facts have been ascertained, a question of law for the judge: *Musgrove* v. *Newell* (4); *Panton* v. *Williams* (5); *Eagar* v. *Dyott* (6); *Blachford* v. *Dod* (7); *Turner* v. *Ambler* (8); *Walker* v. *South Eastern Ry. Co.* (9)

As to corroboration, in *Rex* v. *Tate* (10) it was held that where a prisoner is convicted upon the uncorroborated evidence of an accomplice the conviction may be quashed if the judge at the trial omitted to caution the jury against convicting upon such evidence.

The question here was whether the defendants ought to have acted upon Simmons' story without further inquiry. It is said that the account in the name of James & Co. was no corroboration as against Bradshaw; but it had to be considered in the case of Bradshaw as well as in that of Miller.

It does not follow that because it would be very reasonable to make further inquiry, it is not reasonable to act without doing

(1) [1891] 2 Q. B. 718.
(2) (1863) 11 W. R. 516.
(3) 11 App. Cas. 247, 250.
(4) (1836) 1 M. & W. 582.
(5) 2 Q. B. 169, 186.
(6) (1831) 5 C. & P. 4.
(7) (1831) 2 B. & Ad. 179.
(8) (1847) 10 Q. B. 252, 261.
(9) L. R. 5 C. P. 640, 644.
(10) [1908] 2 K. B. 680.

C. A. 1915

BRADSHAW v. WATERLOW & SONS, LIMITED.

so: *Perryman* v. *Lister*. (1) The fact that the Attorney-General sanctioned this prosecution is really conclusive on this point.

[PICKFORD L.J. referred to *Ravenga* v. *Mackintosh* (2) and *Panton* v. *Williams*. (3)]

If a prosecutor fairly takes competent legal advice he is justified in acting upon it: Clerk and Lindsell on Torts, 6th ed., p. 708. The fiat of the Attorney-General has much greater weight than that. It has never been suggested hitherto, where that fiat has been given on a true statement of facts, that there was no reasonable or probable cause.

The judge was not bound to leave the question to the jury: *Davis* v. *Hardy*. (4) There was no question of fact on which it was necessary to take the opinion of the jury: *Douglas* v. *Corbett*. (5) It is not necessary in every case to leave the question to the jury: *Brown* v. *Hawkes*. (6) The evidence need not be stronger than would be necessary to make a prima facie case: *Dawson* v. *Vansandau*. (7)

McCall, K.C., in reply, referred to *Walker* v. *South Eastern Ry. Co.* (8) and *Hicks* v. *Faulkner*. (9)

PICKFORD L.J. delivered the first judgment. The Lord Justice stated the facts and continued: At the trial, Bray J. was asked to leave to the jury the questions of *Abrath* v. *North Eastern Ry. Co.* (10), i.e., did the defendants take reasonable care to inform themselves of the facts before instituting the prosecution, and did they honestly believe in the charge they made. He declined to leave these questions to the jury, and I think he was quite right. There was no dispute about the facts; they had been proved by the plaintiff when he put in the depositions, and it did not appear from them that any further inquiries would have altered them in any way.

I asked the learned counsel for the plaintiff what inquiries it was suggested the defendants could have made, and the only

(1) (1868) L. R. 3 Ex. 197, 202.
(2) (1824) 2 B. & C. 693.
(3) 2 Q. B. 169.
(4) (1827) 6 B. & C. 225, 231.
(5) 6 E. & B. 511.
(6) [1891] 2 Q. B. 718, 721, 727.
(7) 11 W. R. 516.
(8) L. R. 5 C. P. 640.
(9) (1878) 8 Q. B. D. 167; affirmed (1882) 46 L. T. 127.
(10) 11 Q. B. D. 79, 440; 11 App. Cas. 247.

suggestion in reply was that they should have made inquiries from Mr. Gorbold, which they did, and that they should have called in the expert in skins and their measurements who gave evidence before the magistrate. I do not think it was at all necessary for them to do so, but if they had, the only result would have been that he would have confirmed the information that the skins were wrongly marked as to measurement, and that the marks on the Russian skins had been tampered with. It is true that he said that the tampering might have escaped the notice of a man in Bradshaw's position, but he was obviously speaking of a man who did not suspect anything of the kind, and if the story were true the plaintiff would expect them to be tampered with and would pass them as correct without examining exactly how it was done.

The plaintiff's counsel, however, took the position that it was not necessary for the plaintiff to point out any inquiries that should have been made, but that wherever a person acted on information given by others it should be left to the jury to say whether he had taken reasonable care to inform himself of the facts, and that this was especially so when the principal informant was an accomplice and a dishonest person like Simmons.

I do not think this is so. I agree with what Bray J. said in *Miller* v. *Waterlow & Sons* (1), that such a question should not be left unless there is some evidence of the defendants not having made proper inquiries, and I also agree with what Cave J. said in *Brown* v. *Hawkes*. (2)

It is to be noticed that in *Abrath* v. *North Eastern Ry. Co.* (3) there were facts to suggest that further inquiries might have led the defendants to a different conclusion, i.e., inquiries from persons who knew the man who was said to have made a fraudulent claim, and it was in relief of the defendants that Cave J. put the question about reasonable care, i.e., he asked the jury whether even though they had not inquired from those persons they had done what was reasonable. In the same way the question as to the honest belief of the defendants should not

(1) Not reported.
(2) [1891] 2 Q. B. 718, 720, 721.
(3) 11 Q. B. D. 79, 440; 11 App. Cas. 247.

C. A. 1915

BRADSHAW v. WATERLOW & SONS, LIMITED.

Pickford L.J.

be left to the jury unless there is evidence of the absence of such belief; and the same reasoning applies to this question as to the other.

But there remains the question whether upon the facts as they stood Bray J. was right in ruling that there was no evidence of want of reasonable and probable cause. Simmons was no doubt an accomplice and was a discharged servant, and I think under those circumstances it would be difficult to say it was reasonable to prosecute on his uncorroborated evidence. But as I understand the plaintiff's case it is put in this way. In order to make it reasonable to prosecute on an accomplice's story there must be such corroboration as would be sufficient to support a conviction. In order to support a conviction there must be corroboration strictly implicating the accused. In this case there was no such corroboration.

I regret to say I cannot agree with any of these propositions. I do not think that the question of whether an ordinarily reasonable man is justified in believing and acting on an accomplice's story is the same as whether the corroboration will eventually be found strong enough to warrant a conviction: see *Dawson* v. *Vansandau*. (1)

I think the recent cases of *Rex* v. *Wilson* (2), *Rex* v. *Brown* (3), *Rex* v. *Blatherwick* (4), and *Rex* v. *Crane* (5) show that it is not necessary to have corroboration directly implicating the accused, if the corroboration which exists supports the truth of the story as a whole; and I think that here there was corroboration directly implicating the plaintiff in the fact that the skins which the manager said he only had to examine were found wrongly marked and tampered with, and in the fact that he who was a workman at 30*s*. a week went as a visitor to the house of Miller, who was in a much superior position, and in the letters to Simmons which were produced.

I think that in addition to these facts the defendants were entitled to take into consideration the fact that Simmons' story was admitted to be true in the case of Richards, who was like the

(1) 11 W. R. 516.
(2) 6 Cr. App. R. 125.
(3) 6 Cr. App. R. 24, 147.
(4) 6 Cr. App. R. 281.
(5) (1912) 7 Cr. App. R. 113.

plaintiff an old and trusted servant, and that the unsatisfactory explanation of the James & Co. account pointed to its being true in that respect also.

I think the judgment of Bray J. was quite right and should be affirmed.

In this case also the facts have been laid before the Attorney-General to obtain his fiat under the Prevention of Corruption Act, 1906, and it is difficult to see how under those circumstances there can be said to be an absence of reasonable and probable cause when the Attorney-General had granted his fiat and the facts were not shown to be unfairly put before him. The appeal must be dismissed.

LORD COZENS-HARDY M.R. I am of the same opinion and I have very little to add. In *Blachford* v. *Dod* (1) Littledale J. said this: "In order to raise the question of probable cause, the facts which are to enable the judge to decide whether there be probable cause or not, must be first ascertained. In this case, therefore, it was necessary, in the first instance, to ascertain whether the letter was sent by the plaintiff. That was proved. So was the fact of the summons having issued, and served by the plaintiff, and of the parties having attended, upon that summons, before the Lord Mayor. Then what was there more to be ascertained by the jury? It was not a question of fact for them whether the defendants believed that they had good ground for indicting the plaintiff, but all the material facts being ascertained, it was for the judge to say whether the defendants had reasonable or probable cause for so doing. It being then a question for the judge, I think that, independently of the summons, it was sufficiently shewn that there was probable cause, but assuming that to be doubtful, the summons makes it clear." That seems to me exactly to cover this case. The effect of the evidence has been fully stated by Pickford L.J. The appeal must be dismissed.

WARRINGTON L.J. I agree.

Appeal dismissed.

Solicitors: *Philbrick & Co., for Haynes, Robinson & Co., Bow Road, E.; David A. Romain.*

(1) 2 B. & Ad. 179, 186.

H. C. R.

C. A.

1915

May 12, 13, 14; *June* 15.

[IN THE COURT OF APPEAL.]

THE KING *v.* THE BOARD OF TRADE.

THE KING *v.* LIGHT RAILWAY COMMISSIONERS.

Light Railway—Application to Commissioners—One Written Application in respect of Scheme comprising several Railways—Application allowed in respect of some but refused in respect of other Railways—Right of Appeal to Board of Trade—"Application refused"—Light Railways Act, 1896 (59 & 60 *Vict. c.* 48), *s.* 7, *sub-s.* 6.

Where an application is made, under s. 2 of the Light Railways Act, 1896, to the Light Railway Commissioners, by one written document, for an Order authorizing the construction of what are described in the document as several light railways comprised in one scheme, and the Commissioners grant the application in respect of most but refuse it in respect of some of the railways, the document cannot be treated as containing a separate application in respect of each railway described, and an appeal will not lie to the Board of Trade against "the refusal of an application for a light railway" within the meaning of s. 7, sub-s. 6, of the Act.

So *held* by Swinfen Eady L.J. and Bankes L.J., Phillimore L.J. dissenting.

Decision of Divisional Court [1915] 1 K. B. 162 reversed.

Appeal from the decision of a Divisional Court (Lord Coleridge, Rowlatt, and Shearman, JJ.) discharging orders nisi for prohibition and certiorari; reported [1915] 1 K. B. 162.

Four urban district councils, acting by a joint committee, made an application to the Light Railway Commissioners, in pursuance of the Light Railways Acts, 1896 and 1912, for an Order to authorize the construction by those councils jointly of a light railway divided into twenty-three sections, each numbered separately and comprised in one scheme described as the Dearne Valley Light Railways. The application was made in writing by one document, which separately described each of the proposed railways.

The application was heard by the Commissioners, when it was opposed by the Great Central Railway Company and the Midland and North Eastern Railways Joint Committee. In the result the Commissioners decided to grant the application in respect of nineteen of the proposed railways; but they refused the

application in respect of three railways, and the promoters had abandoned the application in respect of one railway.

The district councils thereupon appealed to the Board of Trade, under s. 7, sub-s. 6, of the Light Railways Act, 1896 (1), against the decision of the Commissioners refusing the application in respect of two of the proposed railways. The Board of Trade entertained the appeal and remitted the application with regard to the said two railways to the Commissioners for further consideration.

The Commissioners then held an inquiry for the further consideration of the said two railways, when counsel for the said railway companies appeared and objected to the further consideration of the matter upon the ground that the Commissioners had no jurisdiction, inasmuch as the application of the promoters had not been refused by them, and the promoters had no right

(1) The Light Railways Act, 1896 (59 & 60 Vict. c. 48):

Sect. 2. "An application for an order authorising a light railway under this Act shall be made to the Light Railway Commissioners, and may be made:—

"(*a*) by the council of any county, borough, or district, through any part of which the proposed railway is to pass; or

"(*b*) by any individual, corporation, or company; or

"(*c*) jointly by any such councils, individuals, corporations, or companies."

Sect. 7, sub-s. 4. "If after consideration the Commissioners think that the application should be granted, they shall settle any draft order submitted to them by the applicants for authorising the railway, and see that all such matters . . . . are inserted therein, as they think necessary for the proper construction and working of the railway."

Sub-s. 6. "Where an application for a light railway has been refused by the Light Railway Commissioners, the applicants, if the council of any county, borough, or district, may appeal against such refusal to the Board of Trade, who may, at any time, if they think fit, remit the application or any portion thereof to the said Commissioners for further consideration with or without special instructions."

Sect. 24. "An order authorising a light railway under this Act may be altered or added to by an amending order made in like manner and subject to the like provisions as the original order.

"Provided that:—

"(*a*) the amending order may be made on the application of any authority or person; and

"(*b*) the Board of Trade, in considering the expediency of requiring the proposals for amending the order to be submitted to Parliament, shall have regard to the scope and provisions of the original order . . . ."

C. A. 1915

REX v. BOARD OF TRADE.

REX v. LIGHT RAILWAY COMMISSIONERS.

of appeal to the Board of Trade. The Commissioners decided that they had jurisdiction to proceed with the further inquiry, and counsel for the opponents thereupon withdrew and took no further part in the proceedings.

Subsequently the said railway companies obtained rules nisi for a prohibition and a certiorari against the Board of Trade; and also rules nisi for a prohibition and a certiorari against the Light Railway Commissioners.

The Divisional Court held that the document containing the application to the Light Railway Commissioners might be treated as containing a separate application in respect of each railway described, so that an appeal would lie to the Board of Trade against the refusal of "an application for a light railway" within the meaning of s. 7, sub-s. 6, of the Light Railways Act, 1896.

The railway companies appealed.

F. D. MacKinnon, K.C., and *Barrington-Ward*, for the Great Central Railway.

Courthope-Munroe, K.C., and *A. Hildesley* (vice *Gilbert S. Shaw*, serving with His Majesty's Forces), for the Midland Railway Company and the Midland and North Eastern Railways Joint Committee.

G. A. H. Branson, for the Board of Trade.

Clavell Salter, K.C., and *Jeeves* (*Ram, K.C.*, with them), for the district councils.

The arguments were the same as in the Court below and do not need repetition in the present report.

Cur. adv. vult.

June 15. SWINFEN EADY L.J. read the following judgment:— These appeals raise a short but important question as to the true construction of s. 7 of the Light Railways Act, 1896.

In November, 1913, four urban district councils in the West Riding of the county of York joined in an application to the Light Railway Commissioners for an Order authorizing them to construct and work a light railway, including a power to take certain land compulsorily, and to erect and construct generating stations, car sheds, and other works.

This railway, for convenience of description, is divided into twenty-three sections, each numbered separately, and is described in detail in the application, and in the deposited plan, section, and book of reference. The application was accompanied (as required by the Rules under the Act) with a draft of the Order applied for. The draft Order contained 106 sections, and is substantially in the same form as a private Bill for the same purpose would have been.

Objections to the Order were lodged by the Midland Railway Company, the Midland and North Eastern Railways Joint Committee, and the Great Central Railway.

On February 26, 1914, and on nine subsequent days, the Commissioners held a public inquiry at Barnsley and in London, and a thick printed volume was produced to us as the proceedings on the inquiry. The parties were represented by counsel and much evidence was adduced, some of it of a technical and expensive character.

After the close of the inquiry the Commissioners proceeded to consider their decision, and they announced it to the parties by letter on March 18, 1914.

This letter is a formal communication, stating the conclusions at which the Commissioners have arrived, and in many cases the reasons for those conclusions.

The Commissioners were of opinion that the application of the four district councils for an Order authorizing a light railway should be granted, subject to the conditions and considerations set forth in their letter.

From this it appears that railway 6a had been withdrawn by the promoters at the local inquiry, and also the proposed powers for a generating station and depot in connection with railway No. 13; that the Commissioners did not think a sufficient case had been made out in support of railways No. 13 and No. 14, and further they considered that the construction of railway No. 8 must be suspended until a bridge to carry the light railway had been substituted for the level crossing at Wath Station. With reference to railway No. 9 the Commissioners did not propose to grant to the promoters the powers asked for. Thus of the twenty-three sections of lines applied for, the route approved by the

C. A.
1915

REX
v.
BOARD OF TRADE.
REX
v.
LIGHT RAILWAY COMMISSIONERS.

Swinfen Eady L.J.

Commissioners embraced nineteen, one had been abandoned by the promoters, and the remaining three sections were not included in the line authorized. These were numbered 9, 13, and 14.

This letter of the Commissioners of March 18, 1914, completely disposed of the question of route so far as the Commissioners were concerned, and was their final and complete decision after an exhaustive public inquiry. There remained, however, to be considered and settled the clauses necessary for the protection of parties interested.

The promoters considered that under the statute they were entitled to appeal to the Board of Trade in respect of the three sections of line which the Commissioners had not sanctioned, and accordingly on March 28, 1914, they appealed in writing "to the Board of Trade, in pursuance of the said section 7 (6.) of the said Light Railways Act, 1896, against the refusal by the said Commissioners of the said application, in respect of and so far as the same proposed to authorise the construction of the said railways Nos. 9, 13 and 14." The promoters abandoned this appeal so far as regards railway No. 9, but proceeded with it as regards railways 13 and 14. The appeal was entertained by the Board of Trade, and on June 12, 1914, the Board of Trade informed the Light Railway Commissioners that the Board had decided to "allow the appeal" under s. 7, sub-s. 6, of the Act in respect of railways Nos. 13 and 14, and accordingly "they remitted the application so far as it related to railways 13 and 14 to the Commissioners for their further consideration in pursuance of the provisions of the Act of 1896." In consequence of this direction from the Board of Trade, the Commissioners appointed a further public inquiry to be held on July 21 at Bolton-upon-Dearne.

The railway companies objected to this procedure, and on July 14, 1914, lodged formal written objections with the Commissioners, insisting upon the point raised on this appeal. They also attended at the further public inquiry and insisted upon the irregularity of such proceedings, and then withdrew, taking no further part in the proceedings.

The Commissioners considered the objections and then made the following announcement: "We are all of opinion that the

Board of Trade having remitted this case to us, it is our business to hear it, but the question of whether we have jurisdiction to hear it is one which will have to be dealt with hereafter." The railway companies thereupon obtained rules for a certiorari and prohibition against the Board of Trade and for a prohibition against the Commissioners. These rules nisi were granted by Horridge and Lush JJ., and after argument were discharged by the Divisional Court (Lord Coleridge, Rowlatt, and Shearman JJ.). (1) From the order of the Divisional Court the present appeal is brought; and the appellants, the Great Central Railway, ask that the rules for certiorari to the Board of Trade and prohibition to the Railway Commissioners may be made absolute, and the Midland Railway and the Midland and North Eastern Railways Joint Committee are content to ask that the rule for prohibition to the Railway Commissioners may be made absolute. The decision of the appeal depends upon the true construction of s. 7, sub-s. 6, of the Act of 1896. Can the promoters appeal under that sub-section to the Board of Trade, where the application for an Order for a light railway has been granted, but it does not extend to the whole of the line applied for? Can they say that "an application for a light railway has been refused" and appeal against such refusal to the Board of Trade?

The Act of 1896 was intended to facilitate the construction and working of light railways, and to substitute a simpler, speedier, and less expensive procedure for a special Act of Parliament. The proceedings, however, before the Commissioners under the Act and Rules bear much resemblance to the proceedings for obtaining a special Act.

Sect. 2 provides that "An application for an Order authorising a light railway under this Act shall be made to the Light Railway Commissioners." Other expressions in the Act are, in s. 7, sub-s. 1, "an application for authorising a light railway," and in s. 7, sub-s. 6, "an application for a light railway"; but whatever the actual phraseology used, in each instance the application is the same, namely, an application for an Order authorizing a light railway.

(1) [1915] 1 K. B. 162.

C. A. 1915

REX v. BOARD OF TRADE. REX v. LIGHT RAILWAY COMMISSIONERS.

Swinfen Eady L.J.

Such an application may be granted or refused, and the alternatives are provided for by sub-ss. 4 and 6 respectively, which are in antithesis to each other.

Under sub-s. 4, if the Commissioners think that the application should be granted, that is that the application for an Order authorizing a light railway should be granted, they shall settle the draft Order, and see that all proper provisions are inserted therein. In the present case, the Commissioners thought that an Order authorizing a light railway should be granted, and accordingly settled the draft Order so far as the route, or numbered sections of railway, was concerned, leaving the clauses to be settled subsequently. It is true that the Order extended only to part of the line which the applicants desired, but in my opinion it was nevertheless a case in which the Commissioners thought that the application should be granted. Granting the application in part is granting it within the meaning of sub-s. 4. Under sub-s. 6, where an application for a light railway has been refused, the applicants, if the council of any county, borough, or district, may appeal against such refusal to the Board of Trade. In my opinion this sub-s. 6 extends only to cases where the whole application is refused—when the Commissioners do not think that any Order should be made. The language of the section contemplates that the whole application will be before the Board of Trade, and this would only be the case where the whole application had been refused, and the appeal involved the whole of it. The Board of Trade may in such a case remit "the application," that is to say, the whole application, "or any portion of it." In many cases, probably in most cases, it would be impracticable to consider a portion only of a scheme, apart from the rest of it.

Again, there are other matters which may form as much an integral part of the application for an Order as the line itself, e.g., the provision of a generating station, or the acquisition of certain lands, or an important feature may be introduced by the Commissioners, by way of condition, as the decision of the Commissioners in the present case that the construction of railway No. 8 must be suspended until a bridge had been substituted for a level crossing. Are the applicants to have a right

of appeal to the Board of Trade under s. 7, sub-s. 6, wherever any portion of their application is not granted or is only granted subject to a condition? In my opinion this is not the intention of the Act—not the true construction of s. 7, sub-s. 6, but the appeal is limited to the refusal of the whole application.

Sects. 9 and 10 provide for the subsequent proceedings before the Board of Trade and the power of the Board to confirm the Order with or without modifications as therein mentioned.

It was suggested in argument that if no appeal lay unless an Order was refused, promoters might be deprived of all right of appeal by the Commissioners acceding to the application so far only as regards some nominal or small portion of the line, but the sufficient answer to this argument is that the Commissioners are a public authority, entrusted by Parliament with important duties, and will do what they consider to be right, just, and proper in the matter.

It is necessary to point out that the only question involved in this appeal is whether a right of appeal under s. 7, sub-s. 6, does or does not exist. The Commissioners have only reconsidered the matter, upon its being remitted to them under that section, and by their amended draft Order have provided that, if the order of the Divisional Court should be reversed on appeal, the railways 13 and 14 will be struck out of the Order before it is confirmed.

We have nothing to do in this appeal with the effect of ss. 9 and 10 of the Act, or with any questions which may arise thereunder.

The only prohibition asked for is to prevent the Commissioners from proceeding further with the matter remitted to them by the Board of Trade on June 12, 1914, on the appeal of the promoters under s. 7, sub-s. 6, from the refusal of an Order so far as regards railways 13 and 14.

In my opinion the promoters had no right of appeal, and the proceedings were irregular. The present appeals should be allowed; the order of the Divisional Court reversed; and the two rules for prohibition, and also the rule for certiorari on the application of the Great Central Railway, should be made absolute.

C. A. 1915

REX v. BOARD OF TRADE.

REX v. LIGHT RAILWAY COMMISSIONERS.

The certiorari will apply to the order or direction of the Board of Trade of June 12, 1914, and the prohibition will apply to the matter remitted to the Commissioners by that order or direction.

PHILLIMORE L.J. read the following judgment:—These are three appeals which have been heard together.

The Great Central Railway Company obtained rules nisi for prohibition to the Light Railway Commissioners and certiorari to the Board of Trade. These rules were discharged by the Divisional Court, and the Great Central Railway Company appeals from the orders discharging the two rules.

The Midland Railway Company, with which the Midland and North Eastern Railways Joint Committee was associated, obtained similar rules which were also discharged. But in this case there is only one appeal from the refusal of the prohibition.

The matter in respect of which these rules were sought for was an application by four urban district councils in the county of York for an Order authorizing a light railway in the Dearne Valley, to which application the several railway companies were objecting.

The order of the Board of Trade sought to be brought up on certiorari and quashed was contained in a letter dated June 12, 1914, remitting the application so far as regards two sections of the railway called railways Nos. 13 and 14 back to the Commissioners for their further consideration. The prohibition sought for was in substance to prohibit the Commissioners from reconsidering their refusal.

The point turns upon the true construction of the Light Railways Act, 1896 (59 & 60 Vict. c. 48). This Act, which has been amended in some respects not material to this case by an Act of 1912 (2 & 3 Geo. 5, c. 19), constitutes the Light Railway Commission and provides for its procedure. The object of the Act is to substitute Orders made through the intervention of the Light Railway Commissioners by the Board of Trade for Acts of Parliament.

An "application for an Order authorizing a light railway," which is the phrase used and by which phrase something equivalent to a railway Bill promoted in Parliament is intended,

may be made by a county, borough, or district council, by any individual, corporation, or company, or by a combination of such applicants. County, borough, and district councils have special powers and privileges conferred by ss. 3, 4, and 17, and sub-s. 6 of s. 7.

It will be convenient in the first instance to analyse the procedure as if the applicant was a private promoter and not one of the privileged bodies. The procedure before the Commissioners is set out in s. 7. The applicant or promoter has to advertise, serve notices and deposit a plan and book of reference, and generally to act very much in the same way as promoters of railway Bills in Parliament are required to act by Standing Orders. The Commissioners are to hold a local inquiry and use such other means as they think necessary to inform themselves and to consider all objections whether made formally or informally.

There is no provision for administering an oath or for compelling the attendance of witnesses or for in any way fettering the Commissioners as to the mode in which they shall conduct their inquiries, nor for the costs of objectors.

When they have held their inquiry the next steps are regulated by sub-ss. 4 and 5, which are as follows: "(4.) If after consideration the Commissioners think that the application should be granted, they shall settle any draft Order submitted to them by the applicants for authorizing the railway, and see that all such matters (including provisions for the safety of the public and particulars of the land proposed to be taken) are inserted therein, as they think necessary for the proper construction and working of the railway. (5.) The Order of the Light Railway Commissioners shall be provisional only, and shall have no effect until confirmed by the Board of Trade in manner provided by this Act."

If one may conjecture what the idea is of giving a power of preliminary veto to the Commissioners, it would seem to be for the sifting of schemes and the elimination of wild-cat proposals; so that neither need the Commissioners waste time and trouble in settling the details of a draft Order which they do not think should be made, nor the Board of Trade have its time taken up

C. A. 1915

REX v. BOARD OF TRADE. REX v. LIGHT RAILWAY COMMISSIONERS.

Phillimore L.J.

by further inquiries, and possibly also that objectors may not be put to further cost.

The result is that the Commissioners may arrest or veto all further proceedings. But their determination in favour of the application is provisional only.

The matter then passes to the Board of Trade, which, under ss. 8, 9, and 10, receives the draft Order settled by the Commissioners with a report of what has passed before them, has to give public notice so as to enable objectors to make or renew objections to the proposed Order, must consider these objections, may require the further help of the Commissioners, and may in the result either send the applicant to Parliament or modify the draft Order or remit it to the Commissioners, or hold a further local inquiry or confirm.

The applicant therefore has only got over the first stile when he has passed the Commissioners, and may find several further obstacles in his path.

Supposing that the Commissioners in the exercise of their power of arresting his progress think that part of his application, that is a certain portion of the line of railway, should be granted and not the rest, can they do so? If they cannot the application is arrested, and they must be taken to have refused it: for it only reaches the Board of Trade if they think it should be granted. But the better opinion seems to be that the application in their hands is severable, and that they can pass part while arresting the rest. The principle "omne majus continet in se minus" applies. If they can stop all, they can stop part. And, inasmuch as an applicant cannot be heard as an objector to his own draft Order and therefore cannot lodge an objection before the Board of Trade under s. 9 (*a*), this stopping of part by the Commissioners is apparently final. At any rate there is no procedure provided for getting over it.

It now becomes necessary to consider the special case of a privileged body provided for by sub-s. 6 of s. 7. "(6.) Where an application for a light railway has been refused by the Light Railway Commissioners, the applicants, if the council of any county, borough, or district, may appeal against such refusal to the Board of Trade, who may, at any time, if they think fit,

C. A. 1915

REX v. BOARD OF TRADE. REX v. LIGHT RAILWAY COMMISSIONERS.

Phillimore L.J

remit the application or any portion thereof to the said Commissioners for further consideration with or without special instructions."

If the application is refused in toto the provision is plain enough.

Can the Commissioners in a case where the applicant is a public body refuse the application in part? There seems no reason for making any difference in their action whether the applicant is a private promoter or a public body, and if so they can. If they could not, their refusal of part would be appealable because it would operate as a refusal of the whole. But if the Commissioners can refuse the application in part, has the public body a right of appeal from such refusal?

Before answering this question one should ask oneself why the special privilege has been given. It would seem that it is in deference to the public body which is not to be supposed to have entered upon the undertaking lightly and unadvisedly, and whose application is not therefore to be so summarily and absolutely set aside. The power of disallowance or rejection given to the Commissioners is mainly if not wholly for convenience' sake, to save further trouble and expense over an application which is pretty sure in the end to fail. But if a local body is the applicant, the Legislature contemplates that as between two authorities, the Commissioners on one side and the local body on the other, the Board of Trade may incline to the latter, a least so far as to think that the scheme should proceed and that its details should be worked out and then submitted to the Board of Trade under s. 9. If this be so, I do not see why faith and credit should not be given to the public body for a part as for the whole, or why it should not make its weight felt as to part as it might as to the whole. If the thing is to proceed, there is little increase of inconvenience in the Board of Trade having to deal with the larger application, even though a portion of it is not likely to survive to the end. One would expect, therefore, that if the Commissioners may refuse part of an application, a public body may appeal from this refusal to the Board of Trade and the Board may entertain the appeal as to this portion and remit it or any portion of it to the Commissioners for further

C. A. 1915

REX v. BOARD OF TRADE. REX v. LIGHT RAILWAY COMMISSIONERS.

Phillimore L.J.

consideration; and I see nothing in the language of the sub-section to compel any other conclusion.

This being so the railway companies fail.

Their complaint is that whereas the Commissioners by a letter of March 18, 1914, had intimated that they thought that the application should be granted save as to the two sections 13 and 14, and two others not now in dispute, and had refused that part of the application which related to the two sections (this being within their power), the urban district councils had without legal warrant purported to appeal from this refusal, and the Board of Trade had purported to entertain the appeal and remit this portion of the application to the Commissioners who were about to rehear it, whereas there was no right of appeal, no power to remit, and no jurisdiction to rehear.

I think, as I have said, that this complaint rests upon a mistaken construction of the Act. If this view of the substantial question be right, it is not necessary to consider questions of form. But I should express my doubt whether, supposing the Light Railway Commissioners to be a tribunal to which a writ of prohibition could appropriately issue, they were shown to be at the time when the rules were applied for doing or about to do anything in excess of their so-called jurisdiction. There is more to be said for the certiorari; but as the remit by the Board of Trade was "without special instructions," I have some doubt as to there being any case for a certiorari.

So far the reasons on which the judgment of the Divisional Court is rested have not been discussed.

I do not agree with some of those given by Lord Coleridge J. I do not think that the accident that for purposes of engineering or parochial convenience the line of light railway for which application was made was divided into twenty-two or twenty-three more or less arbitrary sections called railways makes it a case of twenty-two or twenty-three applications. I am more nearly in accord with one of his reasons, in which I think Rowlatt and Shearman JJ. concurred. If some portions of the proposed light railway are severable, and ex hypothesi railways Nos. 13 and 14 are severable because the Commissioners severed them, it would be no outrage on good sense to treat the application for

C. A. 1915

REX v. BOARD OF TRADE.

REX v. LIGHT RAILWAY COMMISSIONERS.

them as a separate application. This line of argument runs very near that which I have ventured to adopt in the earlier portion of this judgment and may perhaps help to confirm it.

On the whole I am of opinion that the appeals should be dismissed.

BANKES L.J. read the following judgment:—These are appeals by the Great Central Railway Company and the Midland Railway Company against three orders of the Divisional Court discharging two rules for prohibition directed to the Light Railway Commissioners and one rule for a certiorari to bring up an order of the Board of Trade dated June 12, 1914. All the three appeals raise the same point, which turns upon the construction of sub-s. 6 of s. 7 of the Light Railways Act, 1896. This subsection gives the Board of Trade jurisdiction, where an application for a light railway by the council of any county, borough, or district has been refused by the Light Railway Commissioners, to remit the application or any portion thereof to the Commissioners for further consideration. The question for decision in these appeals is whether, in the events which happened, there was any refusal of an application by the Commissioners which justified the Board of Trade in making the order of June 12 remitting certain matters to the Commissioners for reconsideration.

There is no dispute about the facts. The councils of certain urban authorities in the West Riding of Yorkshire appointed a joint committee under s. 17 of the Light Railways Act, 1896, for the purpose of making an application for an Order authorizing a light railway. The application was made on November 28, 1913, and a plan and book of reference were duly prepared and deposited. Upon the plan the intended light railway is divided into twenty-three sections, each separately numbered. This is in accordance with parliamentary practice; and though the Statutory Rules and Orders made under the Light Railways Act do not lay down any directions on the point, the specimen estimate and the note to r. 32 recognize the practice and refer to each numbered line as a "branch of the railway." In their application the promoters treat each section as a light railway,

C. A. 1915

REX v. BOARD OF TRADE. REX v. LIGHT RAILWAY COMMISSIONERS.

Bankes L.J.

and they make application for an order authorizing them to construct and work the railways described in the draft Order which accompanied the application. The draft Order itself provides that it may be cited as the Dearne Valley Light Railway Order, 1914, and, by the interpretation clause, the expression "the railway" is to mean the railways and works by the Order authorized or (as the case may be) any part thereof. Clause 5 contains a description of the railways authorized, and they are there set out numbered as on the plan and application as Nos. 1 to 19a. The draft Order throughout draws a clear distinction between the light railway, the making and working of which is to be authorized by the Order, and the various lines of railway of which it is composed. In the Light Railways Act itself, and in the Rules made under that Act, the expressions "a light railway" and "the railway" are clearly used in the sense of the entire railway which it is desired to construct and work; and both the Act and the Rules contemplate the entire undertaking being included in one application to the Railway Commissioners. This is, I think, an important consideration, having regard to the decision of the Divisional Court, and to some of the arguments addressed to this Court in support of that decision. The procedure contemplated by the Act and the Rules in reference to an application is as follows. The promoters may be either local authorities, or groups of local authorities, or a private person (s. 2). Where groups of local authorities are promoters (as in the present case) they may appoint a joint committee for the purpose of the application, or for the joint construction or working of a light railway (s. 17). The application for an Order authorizing a light railway is to be made to the Light Railway Commissioners (s. 2). Rule 33 requires the application to be signed or sealed by the promoters, as the case may be, and to contain a short statement of the object of the application and an indication of the nature of the traffic to be carried, and it must be accompanied, amongst other things, by three copies of the draft Order. The document which, throughout the Act and Rules, is spoken of as the draft Order is a draft prepared by the promoters of the Order which they seek to obtain. It contains the details of the entire scheme, and of the powers sought to be

acquired. It corresponds to a Bill in parliamentary procedure. The Act speaks of a consideration of an application by the Light Railway Commissioners. What they really have to consider is the draft Order and the other documents accompanying it. Sect. 7 is the section dealing with the consideration of an application. Sub-s. 1 requires the Commissioners to possess themselves by such means as they think necessary of all such information as they may consider material for determining the expediency of granting the application. Sub-s. 3 requires the Commissioners to consider all objections to the application before deciding on an application. Down to this point the section has referred to (1.) a determination by the Commissioners on the expediency of granting the application, and (2.) to a decision being come to by the Commissioners on an application. The last three sub-sections, 3, 4, and 5, indicate what the Commissioners are to do in the event of their being of opinion that an application should be granted, and what may happen in the event of a refusal by them of an application made by a certain class of promoters. Sub-s. 4 provides that if, after consideration, the Commissioners think that the application should be granted, they shall settle any draft Order submitted to them by the applicants for authorizing the railway, and shall see that all such matters (including provisions for the safety of the public and particulars of the land to be taken) are inserted therein as they think necessary for the proper construction and working of the railway. The draft Order, when settled, is treated as the Order of the Commissioners (sub-s. 5) and as the Order made by them under the Act, which they submit to the Board of Trade for confirmation (s. 8). Sect. 7, in my opinion, contemplates a grant of an application which is to be evidenced by the settling of a draft Order; or the refusal of an application which will be evidenced by the fact that the draft Order is not settled, or by an intimation that it will not be settled. The Act does not contemplate, in my opinion, that any decision of the Commissioners is to be construed as in part a grant and in part a refusal of an application. The Commissioners are under no obligation to accept the draft Order in the form submitted to them. They can strike out portions of the scheme altogether, or they can impose

C. A. 1915

REX v. BOARD OF TRADE. REX v. LIGHT RAILWAY COMMISSIONERS.

Bankes L.J.

conditions and limitations which may materially alter the character of the scheme, without striking out any portion of it. In whatever form, however, they settle the Order, it becomes the Order of the Commissioners, and a grant of the application; and as such it is, according to the procedure laid down by the Act, passed on to the Board of Trade for confirmation. If the contention of the respondents is correct it must be open to a promoter who is not satisfied with the Order as settled to contend that, because some material part of his scheme has been omitted from the Order, or has been altered, the Commissioners have refused his application. I cannot adopt a construction of the Act which leads to so inconvenient a result. No doubt there are inconveniences whichever construction of the Act is adopted, but none so great, in my opinion, as that which has occurred in the present case, where a costly litigation has taken place upon the facts as to whether the decision of the Commissioners does or does not amount to a refusal of the application. In my opinion the Act intended the decision of the Commissioners to speak for itself, the test being the settling of the draft Order. If the Order is settled the application is granted; if it is not settled the application is refused. Had the procedure indicated by the Act been closely followed in the present case the present litigation very possibly might not have occurred. The Commissioners, however, having held an inquiry, proceeded to intimate to the parties what they intended to do. This, no doubt, is a convenient course, as it enables a promoter to decide whether it is worth his while to proceed with the matter or not; but it is no part of the machinery provided by the Act. The intimation is contained in a letter dated March 18, 1914, in which the Commissioners, by their secretary, inform the parties that they think that the application should be granted subject to certain conditions and considerations which they indicate; but that as to railways 13 and 14 they think that a sufficient case has not been made out in support of these, and, further, that they did not propose to grant the powers asked for in respect of railway No. 9. Translated into the language of the Act this intimation must be treated as an intimation that the Commissioners were prepared to settle the Order, omitting any reference to

railways 9, 13, and 14. The promoters treated the intimation as a grant of their application except as to railways 9, 13, and 14, and as a refusal as to these railways, and by notice dated March 28, 1914, they appealed to the Board of Trade against this refusal. The Board of Trade treated the matter as in order and they granted the application; and by a letter dated June 12, 1914, the Board of Trade remitted the application, so far as it related to railways 13 and 14, to the Commissioners for their further consideration. This is the order the validity of which is questioned in these proceedings, and the point for decision is whether, in the events which happened, there had been any refusal by the Light Railway Commissioners of an application for a light railway within the meaning of sub-s. 6 of s. 7.

The case for the promoters was put in several ways. One contention was that each of the numbered sections of the railway is a light railway in itself; and therefore the letter of March 28, 1914, was a refusal of an application for three light railways. Another contention was that the application for each numbered section must be treated as a separate application, and consequently the letter of March 28 was a refusal of three applications. Another contention was that the part of the scheme refused was so substantial that it amounted to a refusal of the original application. Lastly it was contended that railways 13 and 14 might be considered as forming a separate light railway, even though the same could not be said of some of the other numbered sections. All these contentions, I think, found favour in the Divisional Court, though the learned judges did not agree either as to the construction of the sub-section, or in the grounds of their decision. With all respect to these learned judges I cannot take the same view as they did with regard to the construction of the Act. For reasons which I have already indicated, I think that the "application for a light railway" in sub-s. 6 of s. 7 is the application as originally made for the scheme as a whole; and that a refusal of such an application is only made within the meaning of the sub-section when the Commissioners are not prepared to settle any draft Order at all. It is said that this is a narrow construction and will lead to grave inconvenience. The

C. A. 1915

REX v. BOARD OF TRADE. REX v. LIGHT RAILWAY COMMISSIONERS.

Bankes L.J

argument from inconvenience may be applied to either construction, but, even if the matter had to be decided on this ground, I should still adopt the construction I have indicated. The language of the section, if read in its ordinary meaning, lays down a self-evident general rule applicable to all cases, and this, in my opinion, ought to outweigh the suggested inconveniences, even if they all existed, which I am not prepared to admit they do. For instance it was said that if the construction I have indicated was adopted, promoters would be obliged to make a separate application for each section of the railway applied for. I do not agree with this argument, as I do not regard such a course as practically possible under the existing Act and Rules. It was also said that the construction which I have put upon the section would deprive local authorities of a very valuable right of appeal to the Board of Trade. I do not agree with this contention either, as, in my view, these promoters are only granted a right of appeal where their scheme is refused as a whole. I do not see why the case should be otherwise. Private promoters are absolutely bound by an adverse decision of the Commissioners. It may be right to give public authorities the right to question a decision of the Commissioners absolutely negativing their scheme; but why should the discretion of the Commissioners, in modifying or altering that scheme, be the subject of an appeal? To adopt such a construction would be to lay down the rule that the Commissioners are the mere mouthpieces of the Board of Trade in relation to an application made by a public authority. We were told by the counsel representing the Board of Trade that that body were influenced in the course they took by the fact that sub-s. 6 of s. 7 authorizes them to remit any portion of an application to the Commissioners. I think that the insertion of a reference to a portion of the application in the latter part of the sub-section is an argument in favour of the view I have expressed above as to the construction of the sub-section, because it indicates that the draftsman had the point in mind, and therefore must be taken to have purposely omitted any reference to a portion of an application in the opening part of the sub-section, and to have included it in the closing part, where it was obviously necessary to insert the words in order to

meet a case where the Board of Trade agreed with the Commissioners in their decision as to some part of the scheme and disagreed only as to some other part.

It is not material in the present case to consider how far the preliminary intimation by the Commissioners of the conclusion at which they had arrived ought to be treated as a final decision by them on any point, as the respondents rely on that intimation as a refusal of their application, and set it up as such. In the view which I take of the section there was no refusal by the Commissioners of the application, and consequently no jurisdiction in the Board of Trade to make the order of June 12, 1914. The rule to bring up that order to be quashed ought, in my opinion, to be made absolute, and both the orders for prohibition ought to go and the appeals should be allowed with costs.

Appeals allowed.

Solicitor for the Great Central Railway: *Dixon H. Davies.*

Solicitors for the Midland Railway and for the Midland and North Eastern Railways Joint Committee: *Beale & Co.*

Solicitor for the Board of Trade: *The Solicitor to the Board of Trade.*

Solicitors for the District Councils of Wombwell, Wath-upon-Dearne, Bolton-upon-Dearne, and Thurnscoe: *Butterworth & Co., for Bury & Walkers, Wombwell.*

W. J. B.

C. A.
1915
July 6, 7.

[IN THE COURT OF APPEAL.]

NEVILLE *v.* DOMINION OF CANADA NEWS COMPANY, LIMITED.

[1914 N. 286.]

Illegality—Contract—Land Company—Newspaper professing to give the Public Honest Advice upon Dealings in Land—Bribe to Newspaper to suppress Comment—Restraint of Trade—Public Policy.

The plaintiff was a director of a company which was engaged in selling land in Canada. The defendants were the proprietors of a weekly newspaper in which they held themselves out as giving honest advice to intending purchasers of Canadian land. The plaintiff agreed with the defendants, who owed him 1490*l.*, that if they paid him 750*l.* by certain instalments and observed the terms of the agreement in all respects he would accept 750*l.* in full satisfaction of their debt, but that on breach of any of the terms the whole 1490*l.*, less any sums paid on account, should immediately become due and payable. One of the terms was that the defendants should not publish in any periodical published by them any comment upon the plaintiff's land company, its directors, business or land, or upon any company with which the defendants had notice that the land company was connected or concerned. Upon a subsequent breach of this term by the defendants, the plaintiff brought this action under the agreement to recover the balance of the whole 1490*l.*:—

Held, affirming the decision of Atkin J., that the agreement was unenforceable, being vitiated by the term in question upon two grounds, namely, (1.) that the term was in restraint of trade and was wider than was reasonably necessary for the protection of the plaintiff, and (2.) that the term was void as being against public policy, inasmuch as it was not consistent with the proper conduct of the newspaper in the public interest.

The plaintiff was a director of Canadian Capital Investments, Limited, a company engaged in the sale of land in Canada and elsewhere, and hereinafter called the land company.

In the year 1912 the land company was advertising for sale certain sections of property outside the city boundary of the city of Regina, Saskatchewan. These advertisements were seriously criticized by the Press as misleading. The Chamber of Commerce of Regina passed a resolution protesting against them, and about the same time certain reputable newspapers declined to continue

C. A.
1915

NEVILLE
v.
DOMINION OF CANADA NEWS COMPANY, LIMITED.

the advertisements of the land company in respect of that particular property.

The defendants were the publishers and proprietors of *Canadian News*, a weekly magazine in which they professed to give information and advice to intending investors in Canadian land. The paper had been published for some months in 1912, and the plaintiff had during the months of October, November, and December of that year lent the defendant company various sums amounting in all to 1490*l.* at least.

By an agreement dated January 24, 1913, and made between the defendant company of the first part, the plaintiff of the second part, and Alexis Maria de Beck of the third part, after a recital that the plaintiff had advanced to the defendant company the sum of 1490*l.*, it was agreed (inter alia) as follows: (*a*) that the defendant company should pay to the plaintiff the sum of 750*l.* by weekly instalments of not less than 10*l.* each, commencing on February 1, 1913; (*b*) that the defendant company should no longer publish in *Canadian News* any advertisement of the land company and all accounts due to the defendant company from the land company should be treated as having been paid and discharged; (*c*) that the defendant company should not publish in *Canadian News* or in any other newspaper or periodical published by the defendant company any comment upon the land company, or its directors, or its business, or in regard to the land owned by the land company in or near Regina, Saskatchewan, or any comment upon any company with which the defendant company had notice that the land company was connected or concerned; (*d*) that if the defendant company should duly and punctually pay the weekly instalments of 10*l.* until the sum of 750*l.* had been received from the defendant company by the plaintiff and provided that all other agreements on the part of the defendant company therein contained had been faithfully observed and performed, then the plaintiff would accept the sum of 750*l.* in full satisfaction of the debt of 1490*l.*, but in the event of the defendant company making default in paying any instalment on its due date or committing any breach, non-observance, or non-performance of any of the terms on its part thereinbefore contained, then the sum of 1490*l.* less any sum paid on account should

C. A. 1915

NEVILLE v. DOMINION OF CANADA NEWS COMPANY, LIMITED.

become immediately due and payable by the defendant company to the plaintiff; and (*e*) that that agreement and the performance of the terms thereof should be treated as operating in full settlement of all claims as between the defendant company and the plaintiff and as between the plaintiff and A. M. de Beck, and the parties thereto agreed that all contracts and obligations as between the defendant company and the plaintiff and as between the plaintiff and A. M. de Beck should be treated as merged in that agreement except so far as to the contrary expressly appeared.

In the issue of *Canadian News* for February 15, 1913, the next issue after the date of the above agreement, there was a paragraph by A. M. de Beck on *Canadian News*, its object and its policy, which, so far as material, was as follows: "And then as regards investors and those who would interest themselves in Canadian finance and real estate, my 'Gold and Glitter' column speaks for itself. That column alone means work of the hardest description. Often I am unable even to go to bed so tremendous is the labour involved by this special branch of my paper. I am often severely criticised by my jealous enemies on that very point, and yet I can honestly say that there is not one opinion in it concerning stocks, shares, real estate or the like which has been given without the most careful investigation. . . . . I am not going to be deterred from doing my duty by jealous critics, by unfair and unjust remarks. I am not to be deterred from doing my duty. I intend to walk straight along that path which I laid down for myself when I started this paper. I intend to expose fearlessly and without favour every fraudulent concern, every doubtful realty, and to protect and assist all those firms that deal fairly and honestly in real estate and first-class investments. I have an ideal before me and I intend to follow that ideal."

After the defendant company had duly paid weekly instalments of 10*l.* to the amount of 550*l.*, the plaintiff commenced this action, alleging breaches of the agreement on the part of the defendant company by publishing comments upon a company with which to the knowledge of the defendant company the land company was connected or concerned and also by commenting upon the land company and its business and upon the plaintiff himself.

The plaintiff sought to recover under the agreement 940*l.*, the balance of the original sum of 1490*l.* after giving credit for the 550*l.* paid by instalments.

At the trial before Atkin J. in November, 1914, the jury found that the defendant company had committed a breach of the agreement, but the learned judge dismissed the action on the ground that the term of the agreement, by which the defendant company agreed not to publish any comments, was invalid as being both in restraint of trade and contrary to public policy and unenforceable in a Court of law, and consequently that there had been no breach of the agreement. His judgment upon the points of law was as follows:—

ATKIN J. I am asked to decide whether or not this contract is enforceable. It is said that it is in restraint of trade. It appears to me quite plainly that it is in fact a negative stipulation; in other words, a stipulation restraining the liberty and the right of the proprietor of the newspaper to comment truly upon matters which are precisely within the sphere of operation of the company, and it is, I think, plainly in restraint of trade. It does not necessarily follow, of course, that it is unenforceable merely for that reason, but if, in fact, that stipulation goes further than is necessary for the protection of the person who has procured that restraint for himself and stipulated for it, then I think it would be unenforceable. Is it more than was reasonably necessary for the protection of the business of the plaintiff company? I think it clearly was. The stipulation is in the widest terms, and, as I say, it prevents any comment upon another company of any sort or kind, whether laudatory or critical; and it prevents that comment, whether it is a comment to expose a fraud or whether it is a comment to advance the interests of the company itself. I think it is far more than is reasonably necessary to protect the interests—and by that I think it must mean the legitimate interests—of the company, to provide that no comment of the nature that I have described can be made. For that reason, to my mind this agreement is unenforceable by reason of its being in restraint of trade, and therefore contrary to public policy.

1914

NEVILLE v. DOMINION OF CANADA NEWS COMPANY, LIMITED.

Atkin J.

But in my opinion, without invoking the doctrine of restraint of trade, this covenant is also unenforceable. It cannot, I think, be doubted but that if a person were to stipulate to refrain from criticism in order to further the fraudulent schemes of any company, the person so agreeing would be exposed to the very serious danger of being held to be engaged in a criminal conspiracy to defraud, whether there was any particular scheme in project at the time or whether fraudulent schemes generally were being contemplated. I do not, of course, say for a moment that that was the case here; there is no evidence upon which I can find that at all. I think the law goes beyond that, and, to my mind, for a newspaper to stipulate for a consideration that it will refrain from exercising its right of commenting upon fraudulent schemes, when it is the ordinary business of the company to comment upon fraudulent schemes, is in itself a stipulation which is quite contrary to public policy, and which cannot be enforced in a Court of law.

The effect of what I have said is this: that this stipulation is, to my mind, an invalid stipulation, and cannot be enforced. Therefore there has been no breach of the agreement, and therefore the event has not happened upon which this sum of 750*l.* or 940*l.* has become payable.

It was said by the plaintiff that the cause of action ought to be treated as not having been brought upon the agreement, but as having been brought upon an ordinary action of debt with the agreement set up by the defendants. I think that the clause of the agreement which I have read and which stipulated that all contracts and obligations between the parties were to be treated as merged in this agreement is probably in itself an answer to that contention, but I am quite clear that the action is not brought in that form. I have had no application to amend the pleading, and in any case if the application had been made under the circumstances of this case I should not have granted it, and with the action in the present form it appears to me that it must fail.

There must be judgment for the defendants, but I think it will appear clearly from what I have said that I am by no means satisfied with the conduct of the defendants in this particular

case. I find that they have entered into this stipulation knowing full well the circumstances under which the stipulation was bargained for and given; I think that there has been a serious dereliction of duty on the part of the defendants in this case, and therefore, while I give them judgment, I give them judgment without costs.

The plaintiff appealed.

Disturnal, K.C., and *Harry Dobb*, for the appellant. This agreement is not vitiated by the clause in question. Although a journal, just like an individual, has a right to comment, it is under no duty to do so. This is not an obligation on the defendants not to do what it was their duty to do.

[WARRINGTON L.J. Is it quite clear that if a paper takes up the line adopted by the defendants there is no duty on it to comment upon undesirable investments or undertakings? It seems to me that their right is not merely a private right.]

Atkin J. thought that this term of the agreement might prevent comment on dishonest business, but there is no duty on a paper to comment on dishonest business, it is merely a right which can be given up lawfully and without committing a breach of any duty. This does not come within any of the descriptions of invalid conditions given by Lord Macclesfield in *Mitchel* v. *Reynolds* (1) and adopted by Stuart V.-C. in *Wilkinson* v. *Wilkinson*. (2) Apart from mere construction, criminal intent cannot be read into an agreement unless it is there in terms, or there is proof of it.

[PICKFORD L.J. But it has been held that even where there was no intent, the agreement might be against public policy: *Smith* v. *Clinton*. (3)]

Further, this agreement is not invalid as being in restraint of trade. A periodical is not on the same footing as a professional man or trader, and there is no authority that a paper may not limit its comments. There can be no objection to a journalist agreeing not to write for a particular paper or on a particular

(1) (1711) 1 P. Wms. 181. (2) (1871) L. R. 12 Eq. 604.
(3) (1908) 25 Times L. R. 34.

C. A. 1915

NEVILLE v. DOMINION OF CANADA NEWS COMPANY, LIMITED.

subject; the rest of the world is open to him to comment upon. The doctrine of restraint of trade, which is based upon public policy, is not applicable to a case like this any more than it is to the case of tied houses, or covenants against using a house otherwise than as a private dwelling-house. Not every restriction on trading is such a restraint as the law will not permit. It must be a restraint which is in itself contrary to public policy, that is, it must be contrary to some statute or some principle of the common law: *Janson* v. *Driefontein Consolidated Mines.* (1) The agreement in question is not contrary to any statute or common law principle, and the Court cannot say arbitrarily that an agreement is against public policy merely because it does not approve of it.

Apart from the agreement, the plaintiff is entitled to this debt and has a right to the money claimed, as shown by the pleadings. He submits that this should be treated as an action upon an ordinary account for money lent.

Schiller, K.C., and *H. A. McCardie*, for the respondents, were not called upon.

LORD COZENS-HARDY M.R. This is an appeal from a judgment of Atkin J., who has given judgment for the defendants, without costs, in an action in which the plaintiff sued for a sum of 1490*l.* on the footing of an agreement of January, 1913. The point raised is this—that the agreement itself is one which, by reason of a particular clause, is tainted in this sense, that no action can be brought upon the agreement.

Who is the plaintiff here? The plaintiff is interested in, and a director of, Canadian Capital Investments, Limited, which is what is called a land company, the company being interested in land in Canada.

Who are the defendants? The defendants are, as their title plainly indicates, a Canadian newspaper company. Their title is "The Dominion of Canada News Company, Limited." The defendants publish a weekly magazine called *Canadian News*. It appears from what has been said in opening, and from what the learned judge said in his judgment—I have no doubt it was

(1) [1902] A. C. 484, 491.

proved in evidence—that the defendant company, in publishing *Canadian News*, profess to give, and I daresay they do give, information to members of the public who want to invest in Canadian land as to the places where, and conditions under which, favourable purchases can be made. If they profess to do that they are bound to do it honestly. The plaintiff's land company had been issuing certain advertisements which had been adversely criticized by some respectable newspapers which had gone so far as to refuse those advertisements. It is not for me to say whether the attacks upon the plaintiff's land company were well founded or not. For the present purposes I will assume that they were not well founded.

This agreement was executed on January 24, 1913, between the defendant company of the first part, the plaintiff of the second part, and Alexis Maria de Beck of the third part, and there is a recital that the plaintiff had advanced to the defendant company a sum of 1490*l.* The agreement contained various clauses, one of which was that the terms of this agreement put an end to all other contracts between them. It provided that the defendant company should pay 750*l.* by instalments of not less than 10*l.* a week, and then comes this clause: that the defendant company should not publish in *Canadian News*—that is their own newspaper—"or in any other newspaper or periodical published by the" defendant "company, any comment upon" the land company, "or its directors, or its business, or in regard to the land owned by Canadian Capital Investments in or near Regina, or any comment upon any company with which" the defendants should have notice that the land company was connected or concerned. What is the effect of that? The defendant company were carrying on the business of newspaper proprietors. It is the business of newspaper proprietors, dealing specially with Canada, and dealing plainly with land purchase in Canada, to comment upon Canadian matters; but this clause provides that this trading company is not to publish "in *Canadian News* or in any other newspaper or periodical published by the company any comment upon Canadian Capital Investments, Limited, or its directors, or its business, or in regard to the land owned by Canadian Capital Investments, Limited, in or near

C. A. 1915

NEVILLE v. DOMINION OF CANADA NEWS COMPANY, LIMITED.

Lord Cozens-Hardy M.R.

Regina, Saskatchewan, or any comment upon any company with which the company have notice that Canadian Capital Investments, Limited, are connected or concerned." That seems to me to be a covenant in restraint of trade. But that alone is not enough to enable us to say whether it is contrary to public policy. I have not heard a word to suggest that it is a "reasonable restraint of trade" in the manner in which those words are used. It is surely wider than is reasonably necessary for any protection to which the plaintiff could possibly be entitled. It is not limited to any attacks upon the plaintiff, and it is not limited to comments upon any land company with which the plaintiff might have anything to do. It seems to me to be plainly a covenant in restraint of trade in this sense: that it is far wider than was reasonably necessary for the protection of the plaintiff.

Needless to say it is perfectly well settled that it is for the Court, and not for a jury, to decide as to the reasonableness of such a covenant. It is for the Court, and the Court alone—we are the persons who have to say whether it is reasonable, in the sense in which I have used the word, and I have no hesitation in saying that it is not reasonable.

That being so, it is perhaps not strictly necessary for me to consider, but if it were necessary for me to consider it I should hesitate a good deal before I came to the conclusion, that what I regard as a bribe paid by the plaintiff to secure complete absence of comment upon any land near Regina with which the land company was concerned was a transaction which could be regarded as otherwise than against public policy. But, as I said, I base my judgment, as the learned judge I think did, upon the ground of restraint of trade. Whichever way you look at it, in my opinion the learned judge was right in saying that no action could be maintained on this agreement, one of the considerations for which was this illegal clause. That being so, I think the appeal fails and must be dismissed with costs.

PICKFORD L.J. I agree.

The action is brought upon the agreement, and upon the agreement alone. I cannot assent to Mr. Disturnal's proposition

that it is also an action brought upon what would have been an ordinary account for money lent. It is based upon the agreement, and upon the agreement only. It is upon the question of whether there is a right to recover upon the agreement, and only upon that, that I intend to give judgment. There might have been possible reasons for saying that if any amendment were necessary in the Court below it might have been made, and the parties might have been left to settle their disputes upon the basis of whether the defendants owed anything apart from the agreement; I think that is not a matter with which we have anything to do. The learned judge—no doubt for good reasons—I will not say refused, because he was not asked, but said he would not allow any amendment, and he said he should not allow this action to be supported upon anything except the agreement, if it could be supported upon that. Therefore it seems to me that the judgment does not interfere with any rights that the parties may have apart from the agreement.

Now, first of all, was this agreement a valid one? In my opinion it was not. The defendants carried on a newspaper; it was not, I think, what is ordinarily called a financial newspaper, but it was a newspaper dealing with companies which dealt with Canadian affairs generally, and which advised people as to investments in the Dominion. The plaintiff was concerned with a company which was dealing with land in the Dominion of Canada, and certain comments had been made upon the plaintiff company and its dealings which were not very favourable comments. Whether they were justified or not I do not know; I will assume they were not; but they had been made, and some newspapers had refused to publish any more advertisements of that company. The defendant company owed the plaintiff somewhere about 1500*l.*, and this agreement was come to in consideration of the defendant company only paying some half of that sum and paying it by instalments. Therefore there was a large money consideration to the company.

I do not think it necessary to read at length the clause of the agreement which is in question. In my opinion it is a clause by which they undertake not to make any comments at all under

C. A. 1915

NEVILLE v. DOMINION OF CANADA NEWS COMPANY, LIMITED.

Pickford L.J.

any circumstances, and not merely for so long as the business is being carried on honestly and fairly in their opinion. They agreed not to make any comments. Whether they contemplated it, or not, is not for me to say, but their agreement was such that if it was sound it prevented them from making any comments upon any dealings of this company, although those dealings might seem to be dishonest and fraudulent and prejudicial to the interests of the readers of the newspaper. It seems to me to be a very strong thing to say that such an agreement as that was a proper one.

I suppose that A. M. de Beck was the editor, or the proprietor of the paper; but he stated what his intention was in carrying on the paper so far as advice with regard to investments went. He said this: "I am not going to be deterred from doing my duty by jealous critics, by unfair and unjust remarks. I am not to be deterred from doing my duty. I intend to walk straight along that path which I laid down for myself when I started this paper. I intend to expose fearlessly and without favour every fraudulent concern, every doubtful realty, and to protect and assist all those firms that deal fairly and honestly in real estate and first-class investments. I have an ideal before me and I intend to follow that ideal." The ideal set out there is a very proper one, I should think, and a very good one for all persons who write in financial newspapers to follow. But he was going to carry out that ideal by commenting upon all other companies except those with which the plaintiff was connected, and refraining from commenting upon the plaintiff's companies, even although they ought to be recommended to the public as good, or, which is more important, although they seemed to be dishonestly and fraudulently carried on, and the public ought to be warned against them. How that is consistent with his ideal it is very difficult to see.

The question, however, for us is whether such an agreement is consistent with the proper conduct of the paper in the public interest. I agree with all that has been said as to a newspaper having no more right to comment than any other member of the public. I think it is a principle which it is very essential to maintain: that a newspaper has no more right to say anything about

a concern than an ordinary individual has. The contrary is very often contended, and I think it is very essential that it should be kept quite clear that a newspaper has no such right. But it is not quite the same thing as saying that you must apply the same considerations to a paper which is carrying on the business of advising the public as you must to the conscience of a private individual. I cannot put this matter in any better words than those used by Atkin J. in his judgment: "To my mind, for a newspaper to stipulate for a consideration that it will refrain from exercising its right of commenting upon fraudulent schemes, when it is the ordinary business of the company"—that means the newspaper company —"to comment upon fraudulent schemes, is in itself a stipulation which is quite contrary to public policy, and which cannot be enforced in a Court of law." With that I entirely agree, and I rather prefer to put my judgment upon this footing, although I do not in the least disagree—in fact I agree —with what the Master of the Rolls has said with regard to restraint of trade.

WARRINGTON L.J. I agree. The defendants in this case are the proprietors of a newspaper. They have taken upon themselves to advise their public on certain land and financial schemes. They have a particular column in their paper which is called the "Gold and Glitter" column, and their editor has made a great parade in this column of the mode in which in that respect he proposes to conduct the affairs of his newspaper. The defendants have taken upon themselves, therefore, the position of advising people, and advising people honestly, as to the merits of certain schemes, and in particular schemes referring to land in Canada.

The plaintiff was a person who was interested in a company engaged in land speculations in Regina, Saskatchewan. I infer from the agreement which is the subject of the present proceedings that up to the time of the agreement the plaintiff and the person acting with him had more or less controlled the defendants' paper. One object of the agreement appears to have been a change in the directorate which would have eliminated the element of the plaintiff's control of the paper. That being so, and the plaintiff severing his connection with the paper, and

C. A. 1915

NEVILLE v. DOMINION OF CANADA NEWS COMPANY, LIMITED.

Warrington L.J.

being a creditor, to a large amount, of the defendant company, the plaintiff gave up something like half his debt in consideration, among other things, of a stipulation that the newspaper would make no comment whatever on the conduct of the plaintiff's company, or rather the land company in which the plaintiff was interested, or its directors or its business, or in regard to the land owned in Regina, Saskatchewan, or any comment upon any company with which the land company was concerned and connected, and with which the newspaper company had notice that it was so concerned or connected. That was the nature of the stipulation. But just see what that might land this newspaper in! The newspaper has assumed a position of giving honest advice to persons concerned in such matters. Let us assume that the land company in which the plaintiff is concerned, or some company with which that company is connected, propounds some fraudulent scheme, and the editor of the paper knows it. By this stipulation he is bound to refrain from making any comment on that fraudulent scheme, and it seems to me that by so abstaining he may actually and actively mislead his public into supposing that there is nothing in the suggestion that the particular scheme is a fraudulent scheme. In other words, he has, I think, accepted a bribe the tendency of which is to prevent him from doing that which under certain circumstances, and having regard to his own conduct, it may be his duty to do.

I prefer to put my judgment on that ground, but I agree with the Master of the Rolls and Pickford L.J. that the contract into which the defendants have entered is a contract in restraint of trade. It is their business to make comments upon these companies. They have undertaken that they will not carry out a certain part of that business by commenting on this particular company or group of companies. That seems to me to be a contract which is in restraint of the trade which they are carrying on, and it is not suggested that the agreement does not go farther than is reasonably required for the proper protection of the plaintiff, because it goes so far that it might prevent—as, if obeyed, it would prevent—the defendants from commenting on the fraudulent conduct of the plaintiff in the conduct of his

business. It cannot be reasonably necessary to prevent that, and therefore in my judgment on both grounds this agreement is invalid.

C. A. 1915

NEVILLE v. DOMINION OF CANADA NEWS COMPANY, LIMITED.

Appeal dismissed.

Solicitors: *Vaughan & Williams; Lewis & Lewis.*

R. M.

DAVIDSON *v.* NEW TABERNACLE (OLD STREET CONGREGATIONAL) APPROVED SOCIETY.

1915 *July* 5.

Insurance (National Health)—Benefits under Part I. of National Insurance Act, 1911*—Married Woman whose Normal Occupation is Employment—Continuance of Employment — Temporary Unemployment on or after Marriage—Right to receive Benefits—National Insurance Act,* 1911 (1 *&* 2 *Geo.* 5, *c.* 55), *s.* 44, *sub-s.* 1*—Definition contained in s.* 79.

By s. 44 of the National Insurance Act, 1911, "Where a woman who has before marriage been an insured person marries, she shall be suspended from receiving the ordinary benefits under this Part" (i.e. Part I.) "of this Act until the death of her husband . . . . Provided that, where a woman who has been employed within the meaning of this Part of this Act before marriage, proves that she continues to be so employed after marriage, she shall not be so suspended so long as she continues to be so employed . . . ."

By a definition contained in s. 79, "For the purposes of" Part I. of the Act, unless the context otherwise requires, a person "whose normal occupation is employment within the meaning of this Part of this Act shall, for the purpose of reckoning the number and rate of contributions, be deemed to continue to be an employed contributor notwithstanding that he is temporarily unemployed . . . .":—

Held, that a married woman cannot, under the sections, be suspended from receiving the ordinary benefits under Part I. of the Act if she is able to prove that she remains a person whose normal occupation is employment within the meaning of the Act, notwithstanding that she may become on or after her marriage temporarily unemployed.

AWARD in the form of a special case stated by referees authorized under s. 67, sub-s. 3, of the National Insurance Act, 1911, by the Insurance Commissioners to decide an appeal submitted to the Commissioners. The appeal was submitted by the appellant Ruth Davidson to the Commissioners under s. 67,

1915

DAVIDSON v. NEW TABERNACLE APPROVED SOCIETY.

sub-s. 1, of the National Insurance Act, 1911 (1), against the decision by an arbitrator of a dispute between her and the New Tabernacle (Old Street Congregational) Approved Society.

The arbitrator was duly appointed in accordance with rule 37 of the rules of the society. (2)

The appellant became a member of the society for the purposes of the Act in 1912, being then a spinster and an insured person within the meaning of the Act.

She was in August, 1913, and had been for some years, employed in a pottery works lifting and carrying clay from outside for use in the works, an occupation which involved

(1) By s. 67, sub-s. 1, of the National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), a dispute between an approved society and an insured person who is a member of such society relating to anything done or omitted by such society under Part I. of the Act shall be decided in accordance with the rules of the society, but any party to such dispute may, in such cases and in such manner as may be prescribed, appeal from such decision to the Insurance Commissioners.

Sub-s. 3: "The Insurance Commissioners may authorise referees appointed by them to decide any appeal . . . . submitted to the Insurance Commissioners under this section."

Sub-s. 4: "The Insurance Commissioners may make regulations as to the procedure on any such appeal or dispute, and such regulations may apply any of the provisions of the Arbitration Act, 1889 . . . ."

By regulations made by the Insurance Commissioners under s. 67 of the Act of 1911, s. 7 of the Arbitration Act, 1889, is to apply to any appeal to the Commissioners from the decision on the dispute.

By s. 7 of the Arbitration Act, 1889, the arbitrators or umpire acting under a submission have power to state an award in the form of a special case for the opinion of the Court.

(2) Rule 37, clause 1, of the Rules of the New Tabernacle (Old Street Congregational) Approved Society provides that "If any dispute shall arise between an insured member . . . . and the society . . . . it shall be decided by arbitration. The party requiring the arbitration shall . . . . deposit with the secretary the sum of 20*s.* as security for the expenses to be incurred in relation to such arbitration . . . . Three arbitrators shall be elected by the society, none of them being directly or indirectly interested in the funds of the society, and in each case of dispute the names of the arbitrators shall be written on pieces of paper and placed in a box or glass, and the one whose name is first drawn out by the complaining party . . . . shall be the arbitrator to decide on the matter in difference."

Clause 2: "Any party to such a dispute arising under the Act may in such cases and in such manner as the Commission prescribes appeal from such decision to the Commission."

walking about all day. On August 5, 1913, she was married to her present husband, and on the previous day gave up her employment. She was then pregnant, the child being born on December 6 following.

On November 4, 1913, Dr. Blair, her panel doctor, gave the appellant a certificate of incapacity for work, stating the cause of incapacity as "pregnancy (œdema)," and this certificate was sent by her to the head office of the society in London, with a claim for sickness benefit. On November 6 the secretary of the society wrote as follows: "With reference to your claim upon the funds of this society, I have to inform you that your illness per se is not considered sickness under the Insurance Act for which benefit is payable. I notice that you have recently married and this being the case will you please read the enclosed form very carefully, answer the questions of same, sign your name and date, and return to me as soon as possible with your marriage certificate." The form in question was duly filled up by the appellant and sent to the society. The only part of the form material to this report is the following question which it contained, namely, "Have you ceased to be an employed person?"—to which the appellant replied by filling up the form with the words "Yes, till I am fit for work again."

On November 13, 1913, the secretary of the society wrote as follows: "With reference to your claim, I very much regret to say that it cannot be allowed as you ceased to be an insured person upon marriage and therefore became suspended from the ordinary benefits under the Act. That of which you have been informed I should like to mention again, and that is, that single persons upon marriage are suspended from receiving the ordinary benefits if they are unable to prove that they remained employed persons."

On December 6, 1913, the appellant was confined and caused a letter to be written on that day to the society as follows: "Will you kindly send me a form so my doctor can fill it up? My husband is in the Post Office" (meaning that he was a deposit contributor) "and not in benefit, so I have got to claim my maternity benefit."

On December 15, 1913, the secretary of the society wrote to

1915

DAVIDSON v. NEW TABERNACLE APPROVED SOCIETY.

the appellant: "With reference to your claim, I must draw your attention to my letter to you of the 13th November last in which I stated that you were suspended from benefits as you could not furnish satisfactory proof that you remained an employed person. If your intentions are that you will resume working again directly your health returns then a statement to this effect and a stamped 6th quarter's card will be accepted as prima facie evidence that you remained an employed person." To this letter the appellant caused a reply to be sent as follows: "I wish to say that I intend to return to my employment as soon as I am able. I only left it as being unable to continue it on account of my health. As soon as I return to work I will get my card stamped. I will be obliged by your sending me the maternity benefit as soon as possible."

On December 21, 1913, the secretary of the society wrote: "In reply to your letter I very much regret having to inform you that we are not satisfied that you have not ceased to be an insured person inasmuch as you have not followed your occupation since your marriage. This event took place as far back as August 5th, 1913, and the period elapsed since then cannot be considered as of a temporary nature."

On May 16, 1914, the appellant requested that her claim should be referred to arbitration according to rule 37 of the society's rules and deposited the sum of 20*s.* in accordance with the rule. Replying to a letter from the secretary of the society the appellant stated on May 20, 1914: "I have not yet returned to work, but intend to do so as soon as I can leave the little one."

The dispute between the appellant and the society eventually came before the arbitrator on July 31, 1914. The arbitrator gave his award dated September 18, 1914. He disallowed her appeal and directed that she should pay the society's costs, namely, the sum of 20*s.* The appellant then appealed to the Insurance Commissioners, who under the powers given them by s. 67, sub-s. 3, of the National Insurance Act, 1911, appointed two referees to decide the appeal.

The appeal was heard before the referees by way of rehearing at Sunderland on March 16, 1915.

1915

DAVIDSON v. NEW TABERNACLE APPROVED SOCIETY.

The facts above stated were not in dispute. The appellant also proved to the satisfaction of the referees and they found as facts (*a*) that the appellant at the time of her marriage, though not then entitled to sickness benefit, was, by reason of her condition, physically incapable of continuing her then employment or any other employment that she could reasonably expect to obtain, and (*b*) that she gave up her then employment because she was physically incapable of continuing it; (*c*) that she bona fide had the intention at the time of her marriage of resuming her former, or other, employment so soon as she should have recovered from the effects of her expected confinement; (*d*) that she bona fide retained that intention up to the date when her claim for maternity benefit accrued, namely, on December 6, 1913, and, so far as this may be material, for a period of at least three months thereafter; (*e*) that after she had left her employment in August, 1913, her place was not kept open for her by her employers, but that she would have had no difficulty in obtaining work at the same employment had she been able to work; (*f*) that between August 5 and December 6, 1913, and for a period of at least three months thereafter, she continued to be a person whose normal occupation was employment within the meaning of the Act, and that during that time she had no intention of abandoning that status for the purpose of devoting herself wholly or mainly to the care of her home and of her child; (*g*) that between November 4 and December 9, 1913, she was rendered incapable of work by some specific disease or bodily disablement within the meaning of paragraph (*c*) of sub-s. 1 of s. 8 of the Act, arising out of abnormal conditions connected with her pregnancy; (*h*) that she had fulfilled all the conditions for the receipt of sickness and maternity benefit prescribed by paragraphs (*b*) and (*d*) of sub-s. 8 of s. 8 of the National Insurance Act, 1911. (1)

(1) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 8, sub-s. 1: "Subject to the provisions of this Act, the benefits conferred by this Part of this Act upon insured persons are—

. . . .

"(*c*) Periodical payments whilst rendered incapable of work by some specific disease or

1915

DAVIDSON v. NEW TABERNACLE APPROVED SOCIETY.

The referees were of opinion that the appellant had proved that she continued to be employed within the meaning of the Act (1) after marriage, and that she was not suspended from receiving the ordinary benefits under the Act at the date when her claims to sickness benefit and maternity benefit respectively accrued, and they allowed her appeal and awarded that the

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by bodily or mental disablement, of which notice has been given, commencing from the fourth day after being so rendered incapable of work, and continuing for a period not exceeding twenty-six weeks (in this Act called 'sickness benefit');

. . . . .

"(*e*) Payment in the case of the confinement of the wife or, where the child is a posthumous child, of the widow of an insured person, or of any other woman who is an insured person, of a sum of thirty shillings (in this Act called 'maternity benefit')."

Sub-s. 8: "Notwithstanding anything in this Part" (i.e., Part I.) "of this Act no insured person shall be entitled—

. . . . .

"(*b*) To sickness benefit, unless and until twenty-six weeks have elapsed since his entry into insurance, and at least twenty-six weekly contributions have been paid by or in respect of him;

. . . . .

"(*d*) To maternity benefit, unless and until twenty-six . . . . weeks have elapsed since his entry into insurance, and at least twenty-six . . . . weekly contributions have been paid by or in respect of him."

(1) National Insurance Act, 1911, s. 44, sub-s. 1: "Where a woman who has before marriage been an insured person marries, she shall be suspended from receiving the ordinary benefits under this Part of this Act" (i.e., Part I.) "until the death of her husband . . . . Provided that, where a woman who has been employed within the meaning of this Part of this Act before marriage, proves that she continues to be so employed after marriage, she shall not be so suspended so long as she continues to be so employed . . . ."

Sect. 79 of the Act provides that for the purposes of Part I. of the Act, unless the context otherwise requires, a person "whose normal occupation is employment within the meaning of" Part I. of the Act "shall, for the purpose of reckoning the number and rate of contributions, be deemed to continue to be an employed contributor notwithstanding that he is temporarily unemployed, but, if such period of unemployment extends beyond twelve months, he shall not continue to be an employed contributor unless the approved society of which he is a member or, if he is not a member of such a society, the Insurance Committee, is satisfied that his unemployment is due to inability to obtain employment, and is not due to any change in his normal occupation."

society do pay to her the sum of 30*s.* by way of sickness benefit and 30*s.* by way of maternity benefit.

If, however, the Court was of opinion that on the facts above stated the appellant did not continue to be employed after marriage, and was suspended from receiving ordinary benefits under the Act at the time when her claims for sickness benefit and for maternity benefit respectively accrued, then they awarded that her appeal be dismissed.

A. S. Comyns Carr, for the society. The question is whether the appellant's expression of intention to return to employment is sufficient to show that she has proved that she "continues to be so employed after marriage" within the meaning of s. 44, sub-s. 1, of the National Insurance Act, 1911; in other words whether, where a woman leaves her employment at the time of her marriage because she is physically unfit to continue it and has the bona fide intention of returning, she has proved that she has continued to be employed after her marriage within the meaning of the section. That expression of intention is not sufficient. By s. 1, sub-s. 2, of the Act the persons employed within the meaning of Part I. of the Act include persons who are engaged in any of the employments specified in Part I. of the First Schedule to the Act, and by Part I. of the First Schedule to the Act these employments are specified under the heads (*a*) under any contract of service or apprenticeship; (*b*) under "such a contract" as master or member of the crew of any ship registered in the United Kingdom or of a British ship of which the owner resides or has his principal place of business in the United Kingdom; (*c*) as an outworker; (*d*) "in plying for hire with any vehicle or vessel the use of which is obtained from the owner thereof under any contract of bailment." Therefore employment means employment under a contract of service. Sect. 79 of the Act has no application to the present case. Sect. 44 does not deal with the question of "reckoning the number and rate of contributions" to which s. 79 relates. Sect. 9, sub-s. 4, and s. 10 are the principal sections relevant to the number and rate of contributions. Sect. 44 does not deal with the married woman's contributions, but with her benefits. *Jones* v. *Ocean*

1915

DAVIDSON v. NEW TABERNACLE APPROVED SOCIETY.

Coal Co. (1) and *Appleby* v. *Horseley Co.* (2) show that in Sched. I. of the Workmen's Compensation Act, 1897, "employment" means "continuous employment," and a similar meaning must be given to the word "employment" in s. 44 of the National Insurance Act, 1911. There must be a contract for the continuity of the employment. In the present case there was no existing contract. If s. 79 were applicable to the present case it would be in contradiction to the terms of s. 44. If the decision of the Commissioners is right a married woman need only say she intends to return to work and she would continue to be entitled to the benefits under the Act. Sect. 44 must be construed according to its strict meaning and without regard to s. 79. [Sect. 44, sub-s. 2, clause (*b*), and the proviso to the sub-section were also referred to.]

H. L. Murphy, for the appellant. If the argument on behalf of the society were upheld the result would be that any cessation of employment after marriage would prevent a married woman continuing to be employed, and although she continued to pay her contributions after marriage, if she became ill and in consequence unemployed, she would lose the benefits under the Act. Another result would be that if a pregnant woman married in order to legitimatize her child and then ceased to be in fact employed she would be deprived of all benefits under the Act, whereas if she had not married she would not be subject to the provisions of s. 44 and would be entitled to the benefits. By s. 1, sub-s. 2, an "employed contributor" is an employed person, and the effect of s. 79 is therefore that the normally employed person temporarily unemployed for any period up to twelve months is not to suffer the disability of an unemployed person. A person who has a normal occupation is to be deemed to be an employed contributor, but the effect of ss. 44 and 79 is that in the case of a married woman the onus of proof is on her, whereas employment is presumed in the case of a man. That is in accordance with what is usually the fact, because a female employed contributor when she marries ceases, as a rule, to be employed.

Comyns Carr in reply. Sect. 44 contains a complete and separate code as to married women.

(1) [1899] 2 Q. B. 124. (2) [1899] 2 Q. B. 521.

1915

DAVIDSON v. NEW TABERNACLE APPROVED SOCIETY.

ATKIN J. This case has been stated by referees appointed by the Insurance Commissioners under the provisions of s. 67 of the National Insurance Act, 1911, and the facts summarized appear to be that the appellant, Mrs. Davidson, was, while she was a spinster, an insured person within the meaning of the Act, and became a member of the New Tabernacle (Old Street Congregational) Approved Society. She was in August, 1913, employed in pottery works, and was therefore an "employed contributor" within the meaning of the National Insurance Act, 1911. On August 5, 1913, she was married to her present husband, giving up her employment on the day before. She was then pregnant and was at that time suffering probably from the consequences of pregnancy, and she was unable until after December 6, 1913, when the child was born, to follow her employment. During that time, as the referees find, she gave up her employment because by reason of her condition she was physically incapable of continuing at work, but she bona fide had at the time of her marriage the intention to return to her employment, and though her place was not kept open for her she would have had no difficulty in obtaining work at the same employment, and she continued to be a person whose normal occupation was employment within the meaning of the Act. Now, in those circumstances she claimed sickness benefit and maternity benefit from the society, and the society eventually refused to make payments to her, and relied upon the provisions of s. 44, sub-s. 1, of the Act. It is those provisions which I have to construe, together with the definition section, s. 79. Sect. 44, sub-s. 1, provides that "Where a woman who has before marriage been an insured person marries, she shall be suspended from receiving the ordinary benefits under this Part of this Act until the death of her husband,"—and then some words follow which I need not deal with,—"Provided that, where a woman who has been employed within the meaning of this Part of this Act before marriage, proves that she continues to be so employed after marriage, she shall not be so suspended so long as she continues to be so employed, and that, where a married woman so suspended from the ordinary benefits becomes employed within the meaning of this Part of this Act before the death of her husband,

1915

DAVIDSON v. NEW TABERNACLE APPROVED SOCIETY.

Atkin J.

contributions shall thereupon again become payable in respect of her, and she shall cease to be suspended from receiving the ordinary benefits, but, subject to regulations made by the Insurance Commissioners, she shall, for the purposes of those benefits, be treated as if she had not previously been an insured person." The society say that the appellant was suspended under s. 44, sub-s. 1, from receiving the ordinary benefits under the Act, and that she does not come within the proviso because she has not proved that she continued "to be so employed," and they contend that for this purpose it is necessary for her to prove that in fact she had entered into a contract of service. They say that the Act provides that she shall not be suspended so long as she "continues to be so employed" and that, inasmuch as this woman never entered into a contract of service at all between the date of her marriage and the birth of her child or indeed afterwards up to the time when the dispute arose, she is not entitled to the benefits in question. The referees appointed by the Commissioners have made certain findings of fact, and have expressed the opinion that she is entitled to the benefit of the definition in s. 79 of the Act. That definition is as follows: "A person whose normal occupation is employment within the meaning of this Part of this Act shall, for the purpose of reckoning the number and rate of contributions, be deemed to continue to be an employed contributor notwithstanding that he is temporarily unemployed, but, if such period of unemployment extends beyond twelve months, he shall not continue to be an employed contributor unless the approved society of which he is a member or, if he is not a member of such a society, the Insurance Committee, is satisfied that his unemployment is due to inability to obtain employment, and is not due to any change in his normal occupation." It is said on her behalf that she is entitled to the benefit of that definition, and that, being a person whose normal occupation is employment within the meaning of the Act, she shall be deemed to continue to be an employed contributor, notwithstanding that she is temporarily unemployed. I have to decide whether these two sections can be reconciled in respect of a married woman. The effect of the contention of the society is that as soon as a woman becomes, from whatever

cause, unemployed after marriage she is unable to claim sickness benefit, and that she is unable to claim maternity benefit for herself, though, of course, if she married a man who is a contributor under the Act she would be entitled to the maternity benefit in respect of his contribution. It would, therefore, follow that not only would she lose sickness benefit and maternity benefit, but supposing that she afterwards became employed she would have to pay for a period of twenty-six weeks before she would be entitled to sickness benefit on her own account. If she did not marry at all she would be entitled to sickness benefit and to the maternity benefit, and not be under the disability I have mentioned in respect of the twenty-six weeks, because then, quite clearly, s. 79 would apply on her behalf. It is not at all easy to construe those two sections, and I have felt considerable difficulty with respect to them, but, upon the whole, I think that the view that has been taken by the referees is the right one. I think that under s. 79 no distinction is made between a man and a woman, whether the woman is married or unmarried. I think that where her normal occupation is employment within the meaning of the Act she is, for the purpose of reckoning the number and rate of contributions, to be deemed to continue to be an employed contributor; in other words that the fact of a working woman getting married does not alter her position as an assured any more than it does in the case of a man. A working woman, just as a man, may in my judgment marry and take a honeymoon without the risk of losing the benefits during the period at the end of which she in fact returns to work. That appears to me to be a reasonable conclusion, and to be the proper meaning of this Act, to which no doubt a beneficial interpretation ought to be given if possible, when it is clearly consistent with the intention of the Act. If I thought that s. 44, sub-s. 1, was quite clearly inconsistent with the construction given to it by the referees appointed by the Insurance Commissioners, I should of course have to give effect to the true construction, notwithstanding difficulties which do not seem to have been contemplated by the framers of the Act. But in all the circumstances of the case, though the appellant as a married

1915

DAVIDSON v. NEW TABERNACLE APPROVED SOCIETY.

Atkin J.

woman no doubt had to prove that she continued to be employed after marriage, I think that she has proved that she continued to be employed after marriage, when she proved that her normal occupation was employment within the meaning of the Act. In this case the referees have found that as a fact, and that being so it appears to me that the appellant is entitled to the benefits which they have awarded her. I cannot on this case stated interfere with the actual benefits. They have given her sickness benefit and maternity benefit. That is not a matter that comes before me. If there is any means of disturbing the award on that point it is by some other proceeding. My decision must be in favour of the appellant, Mrs. Davidson.

Award confirmed.

Solicitors for appellant: *Kingsley, Wood & Co.*

Solicitors for New Tabernacle Approved Society: *Withers & Co.*

J. E. A.

1915

July 28.

NOTLEY *v.* LONDON COUNTY COUNCIL.

[1915 N. 478.]

London—District Surveyor—Power of London County Council to dismiss—Metropolitan Building Act, 1855 (18 & 19 *Vict. c.* 122), *s.* 32—*Local Government Act*, 1888 (51 & 52 *Vict. c.* 41), *s.* 40, *sub-s.* 8—*London Building Act*, 1894 (57 & 58 *Vict. c. ccxiii.*), *s.* 215, *sub-s.* 1, *and Sched. IV.; s.* 217.

By s. 32 of the Metropolitan Building Act, 1855, the Metropolitan Board of Works may "by order, at their discretion . . . . dismiss any existing district surveyor, with the consent of one of Her Majesty's principal Secretaries of State; they may suspend any such surveyor as last aforesaid; they may dismiss or suspend any future district surveyor, and in case of any suspension or during any vacancy they may appoint a temporary substitute."

By s. 40, sub-s. 8, of the Local Government Act, 1888 (51 & 52 Vict. c. 41), the powers, duties, and liabilities of the Metropolitan Board of Works were transferred to the London County Council.

By the London Building Act, 1894, s. 215, sub-s. 1, and the Fourth Schedule, the Metropolitan Building Act, 1855, is repealed.

By s. 217, "Officers appointed under any enactment hereby repealed

shall continue in office in like manner as if this Act had not been passed" :—

Held, that under the above sections the London County Council have power to dismiss a district surveyor appointed after August 14, 1855, at their pleasure.

ACTION brought by the plaintiff claiming a declaration that a resolution of the defendants, dated March 16, 1915, purporting to dismiss the plaintiff from his office of district surveyor for the district of Bethnal Green West, was illegal and invalid and void, and that the plaintiff was and is and will be entitled to hold the said office and perform the duties thereof notwithstanding the said resolution.

The plaintiff further claimed an injunction restraining the defendants from enforcing or in any way acting upon the said resolution.

In December, 1875, the Metropolitan Board of Works, in pursuance of the power conferred upon it by the Metropolitan Building Act, 1855, appointed the plaintiff to be the district surveyor under the Act for the district of Bethnal Green West.

The plaintiff continued to hold the office of district surveyor until March 16, 1915, when the defendants, having become dissatisfied with the manner in which the plaintiff carried out his duties, passed a resolution that his services be dispensed with as from September 30, 1915, and on March 19, 1915, they informed the plaintiff by letter that they had passed the resolution. The plaintiff alleged that by the said letter the defendants wrongfully purported to determine his said appointment as from September 30, 1915, and to deprive him of his said office.

The defence (so far as material to this report) was that the defendants were empowered by s. 139 of the London Building Act, 1894 (or by s. 217 of that Act), together with s. 32 of the Metropolitan Building Act, 1855, to dismiss the plaintiff at their discretion.

By s. 32 of the Metropolitan Building Act, 1855 (18 & 19 Vict. c. 122), the Metropolitan Board of Works may "by order, at their discretion . . . . dismiss any existing district surveyor, with the consent of one of Her Majesty's principal Secretaries of State; they may suspend any such surveyor as last aforesaid;

1915

NOTLEY v. LONDON COUNTY COUNCIL.

they may dismiss or suspend any future district surveyor, and in case of any suspension or during any vacancy they may appoint a temporary substitute."

By s. 40, sub-s. 8, of the Local Government Act, 1888 (51 & 52 Vict. c. 41), the powers, duties, and liabilities of the Metropolitan Board of Works were transferred to the London County Council.

By s. 139, sub-s. 1 (*b*), of the London Building Act, 1894 (57 & 58 Vict. c. ccxiii.), the London County Council "may dismiss . . . . any district surveyor . . . . provided that their dismissal of a district surveyor who held such office before the 14th of August, 1855, shall be subject to the consent of a Secretary of State."

By s. 215, sub-s. 1, and Sched. IV., the Metropolitan Building Act, 1855, is repealed. By s. 217, "Officers appointed under any enactment hereby repealed shall continue in office in like manner as if this Act had not been passed."

Freeman, K.C., and *T. T. Paine* (*A. M. Bremner* with them), for the plaintiff. The defendants had no power to dismiss the plaintiff. The power of dismissal conferred by s. 32, sub-s. 2, of the Metropolitan Building Act, 1855, coupled with s. 139 of the London Building Act, 1894, must be exercised judicially and reasonably and not arbitrarily. That rule applies with peculiar force in the case of district surveyors. They are not servants of the defendants although appointed by them. They are independent officers: *Westminster Corporation* v. *Watson* (1); *London County Council* v. *District Surveyors' Association and Willis.* (2) By s. 34 of the Metropolitan Building Act, 1855, every district surveyor is to have and maintain an office at his own expense, and by s. 35, if he is prevented by illness, infirmity, or other unavoidable circumstances from attending to the duties of his office, he may appoint a deputy to perform his duties for such time as he may be prevented from attending to them. The appointment of a deputy is subject to the consent of the council, but the council would not be justified in withholding this consent as an excuse for dismissing him. By s. 36 the council is empowered, when

(1) [1902] 2 K. B. 717, at p. 726. (2) [1909] 2 K. B. 138.

it appears to them that the district surveyor on account of pressure of business or "on any other account" cannot discharge his duties promptly and efficiently, to appoint an assistant surveyor who is to receive all fees payable in respect of the services performed by him. The whole tenor of these provisions is contrary to the power claimed by the defendants to dismiss the district surveyor at their pleasure. The only grounds upon which the council are empowered to dismiss him are those set out in s. 54 of the Act of 1855, which are in substance re-enacted by s. 162 of the London Building Act, 1894, and are limited to cases of overcharge of fees, or untrue or fraudulent accounts, in which cases the council may, acting upon a report of the superintending architect, take such steps in the matter as they may deem expedient. Under the Metropolis Buildings Act, 1844 (7 & 8 Vict. c. 84), ss. 65 and 67, district surveyors were appointed by justices of the peace subject to the consent of a Secretary of State and were to hold office "during the pleasure only of . . . . the justices," and in case of misconduct, district surveyors were by s. 79 liable on complaint to the justices to fine or dismissal. The Act of 1855 contains no reference to the office being held during the pleasure of the Board. [*Dean* v. *Bennett* (1) was also referred to.]

Macmorran, K.C., and *F. F. Daldy*, for the defendants, were not called upon.

ROWLATT J. It is quite clear what my decision in this case must be. I have no doubt that the matter is an important one, but in my opinion it presents no difficulty.

Before the passing of the Metropolitan Building Act, 1855, district surveyors were appointed under the Metropolis Buildings Act, 1844, which enacted that they were to hold their office "at the pleasure of the justices." Under s. 32 of the Metropolitan Building Act, 1855, the defendants may "by order, at their discretion" (sub-s. 2) "dismiss or suspend any future district surveyor . . . ." and (sub-s. 3) "whenever any vacancy occurs in the office of any existing or future district surveyor they may appoint another qualified person in his place." Therefore they

(1) (1870) L. R. 6 Ch. 489.

1915

NOTLEY v. LONDON COUNTY COUNCIL.

Rowlatt J.

may by order at their discretion dismiss any future district surveyor.

Now, the plaintiff was appointed to an office the tenure of which is indicated by those words. In my judgment the words perfectly clearly denote and describe an office held at the pleasure of this body—the Metropolitan Board of Works as it was then, the London County Council as it is now—just as clearly as did the words in the Act of 1844 "during the pleasure of the justices." Of course, if there were anything in the Act of 1855 beyond the words I have referred to which pointed to some tenure, such as a freehold tenure or tenure dum se bene gesserit, or subject to any notice, or anything of that kind, I should very readily construe the words "at their discretion" &c. and "may dismiss" as being subject to those terms and should hold that the defendants were, in exercising their discretion, to carry and work out that tenure and give effect to it. But I cannot find any trace of anything of the sort. On behalf of the plaintiff Mr. Freeman has pointed out that by s. 35 powers are given to the surveyor, with the consent of the Board, to appoint a deputy when he is incapacitated by illness, and by s. 36 power is given to the Board to give him the assistance of other persons who will relieve him of some of his duties. It is true that those provisions show that a district surveyor need not be dismissed when he cannot do his duty temporarily, or cannot do all his duties, but the object of the introduction of those sections is to provide for the deputy having sufficient authority, because a person cannot appoint a deputy to perform anything which savours of judicial functions without legal authority. Sect. 35 is wanted to avoid the difficulty, arising when a surveyor becomes temporarily ill, of either having to dismiss him or the whole business in his office being suspended. Sect. 36 is also wanted to enable a supernumerary to be appointed when there is a pressure of work, or in order to enable the Board to confer the authority necessary to a district surveyor upon other persons. I do not think those sections throw much light upon the question I have to decide. It was also strongly urged by Mr. Freeman that the position of district surveyor is a very peculiar one and that an inference as to the nature of the tenure of his office can be drawn from

that fact. There is no doubt that a district surveyor is not the servant of the county council in the sense of being under their orders. He is, very largely, an independent officer with judicial functions; but the power of appointing and dismissing him is undoubtedly in the county council, and it only is a question whether that power is to be exercised at pleasure or whether it is to be exercised subject to any limitations. In my opinion his position is not necessarily more permanent because he exercises judicial functions than it would be if he did not. Whether it is advisable that it should be is not for me to say, but no doubt if any district surveyors were dismissed capriciously so as to bring pressure to bear upon them as a body as to the way in which they should carry out their judicial duties, the county council might, it is to be hoped, hear of it, possibly from the electors. But Parliament trusts the county council not to do such things. That is the answer to all this class of argument. The mere fact that a person has a judicial character does not ipso facto show that he does not in law hold his office at pleasure, because it is commonplace and well known that, but for statute, every judge in this country would hold his office during the pleasure of the Crown. Therefore, although I rather sympathize with the position taken up by the plaintiff from one point of view, I do not think he has any case in point of law, and I must hold that this action fails because the county council have power to terminate this gentleman's tenure of his office at their pleasure.

Taking the view which I do, the manner in which the defendants used their discretion in the present case is an entirely superfluous matter for me to go into, but it is not to be supposed that they did not come to a very wise and proper decision. I express no opinion on that point.

Judgment for defendants.

Solicitors for plaintiff: *Bullen, Debenham & Co.*
Solicitor for defendants: *E. Tanner.*

J. E. A.

C. A.
1915
June 30.

[IN THE COURT OF APPEAL.]

AUSTIN FRIARS STEAMSHIP COMPANY, LIMITED *v.* SPILLERS & BAKERS, LIMITED.

[1914 A. 724.]

Shipping—General Average Act—Ship and Cargo in Danger—Damage to Dock—Tortfeasors—Contribution.

Liability for damage to property, where the damage is directly consequential on a general average act, may be the subject of a general average contribution, even assuming that the owners of ship and cargo were joint tortfeasors in relation to the damage.

The principle of common law laid down in *Merryweather* v. *Nixan* (1799) 8 T. R. 186; 1 Sm. L. C., 12th ed., p. 443, that there cannot be any contribution between joint tortfeasors is one which ought not to be extended and does not apply in the case of contribution in general average.

A ship and her cargo being in imminent danger from perils of the sea, the master and a pilot who was on board, having to choose between running her aground and entering S. Dock, with the probability of her injuring the dock, chose the latter alternative. In the attempt to enter the ship collided with one of the piers of the dock, sustained injury to the amount of 1600*l.*, and inflicted injury to the amount of 5000*l.* The Court found as a fact that to put into S. Dock with the knowledge that in doing so the ship would strike the pier was a reasonable and prudent thing to do in the interests of ship and cargo:—

Held, that the taking the ship into S. Dock was a general average act and that the owners of the ship were entitled to recover from the owners of the cargo contribution in general average both in respect of the injury to the ship and the injury to the pier, the loss being in each case the direct consequence of a general average act.

Decision of Bailhache J. [1915] 1 K. B. 833 affirmed.

Appeal from a decision of Bailhache J. (1)

The facts, which were not in dispute, were as follows:—

The plaintiffs, the owners of the steamship *Winchester*, claimed from the defendants, the owners of the cargo, contribution in general average in respect of two items of alleged general average sacrifice and expenditure. The defendants denied their liability upon the ground that the items in question were neither general average sacrifice nor expenditure.

The steamship *Winchester* was on November 6, 1912, bound

(1) [1915] 1 K. B. 833.

C. A. 1915

AUSTIN FRIARS STEAMSHIP COMPANY, LIMITED v. SPILLERS & BAKERS, LIMITED.

for Sharpness Docks with a cargo of maize. As she was proceeding up the Severn, a little way short of the docks she grounded. She floated next morning on the flood tide and was carried by the tide further up the Severn to a point about a mile above the entrance to the docks, where she was stranded. She became very seriously damaged, and both ship and cargo were in imminent danger. On the morning of November 7 she was got off on the ebb tide with the assistance of tugs. She had no steam of her own, and only her hand-steering gear was available. She had a pilot on board, and the intention at first was to take her down the river to a place called Ackthorn, and there put her on the ground for the greater safety of ship and cargo. After she had been towed about half a mile, the carpenter reported that she was making water, and the master and pilot thereupon consulted and decided to take her into dock. To get there she had to be taken between two piers. The ebb tide was running strongly, as it does in the Severn, and both master and pilot contemplated her striking the lower pier and doing damage. The pilot in fact intended that she should touch the lower pier, as he said, to take the reach off her, and he remarked that it was not the time to trouble about another thousand pounds worth of damage. The master and pilot both considered that as between going to Ackthorn and hitting the pier the latter was the lesser of the two evils, and took action accordingly. As was anticipated, she struck the pier with her starboard bow, and struck it twice in fact. She struck harder than the pilot intended and damaged herself to the extent of about 1600*l.* and the pier to the extent of about 5000*l.* These were the two items in question.

Bailhache J. found as a fact that to put into Sharpness with the knowledge that in doing so the ship would strike the pier was a reasonable and prudent thing to do in the interests of the ship and cargo. He held that the operation of getting the *Winchester* off and taking her either to Ackthorn or into Sharpness was, under the circumstances, a general average act, and further that, even assuming the collision with the pier to be a tort for which the owners of the ship and the owners of the cargo would be liable, the former were none the less entitled to contribution in general average in respect of both items, the loss being in each case

C. A. 1915

AUSTIN FRIARS STEAMSHIP COMPANY, LIMITED v. SPILLERS & BAKERS, LIMITED.

the direct consequence of a general average act. He accordingly gave judgment for the plaintiffs.

The defendants appealed.

Leslie Scott, K.C., and *W. N. Raeburn*, for the appellants. The taking of the vessel into the dock at Sharpness was not a general average act. It was merely the consequence of a particular average damage. If a ship about to sink is stranded in order to save her, that is not a general average loss according to the practice of average adjusters. That practice differs in some respects from the York-Antwerp Rules: Arnould on Marine Insurance, 9th ed., ss. 933 et seq., p. 1161. But even by those rules the stranding of a ship would not be a general average act if it were shown that the ship must inevitably be lost. Where loss is inevitable it lies where it falls. The definition of general average is given by Lawrence J. in *Birkley* v. *Presgrave*. (1) "All loss" said that learned judge "which arises in consequence of extraordinary sacrifices made or expences incurred, for the preservation of the ship and cargo come within general average, and must be borne proportionably by all who are interested." In *The Leitrim* (2) Gorell Barnes J. explained that the words "all loss" did not include loss which affected the loser only and with which the other interests are not concerned. In the present case the ship found herself in circumstances in which further damage was inevitable. If one course had been open to the master, namely, to run the ship aground, there would have been no general average act in doing that. If, as in the present case, two dangerous alternatives present themselves, the master does not by choosing one convert the case into one of general average. [Lowndes on General Average, 4th ed., p. 36 (5th ed., p. 40), and 4th ed., App. E, p. 426; also 4th ed., p. 114 (5th ed., p. 136); and Arnould on Marine Insurance, 9th ed., s. 941, p. 1171, were cited.]

The Marine Insurance Act, 1906, s. 66, whatever may be its effect as between underwriters and assured, has no application to the relations between shipowner and cargo owner.

Secondly, assuming that the act in question was a general

(1) (1801) 1 East, 220, at p. 228.

(2) [1902] P. 256, 266.

average act, there is no authority for holding a liability to third persons to be a general average sacrifice. The law of general average is derived from the Rhodian law and has been imported into our maritime law. There is no instance to be found of general average contribution arising out of an act of trespass to the property of a third person: Arnould on Marine Insurance, 5th ed., s. 933, p. 1161.

The master of a ship acting for the best on an emergency acts as agent for the owner of the cargo as well as the owner of the ship. If while acting on behalf of the ship and cargo he commits a trespass to the property of others both the shipowners and the cargo owners are joint tortfeasors. It is a rule of common law that there is no contribution between joint tortfeasors: *Merryweather* v. *Nixan*. (1)

MacKinnon, K.C. (*Adair Roche, K.C.*, with him), for the respondents. The point made by the appellants is that this was a claim for contribution in general average for a voluntary stranding and that there is no authority that such a claim can be made. It is clear, however, that voluntary stranding gives rise to a general average contribution. That principle has been recognized by Bigham J. in *Iredale* v. *China Traders Insurance Co.* (2) and by all the text-writers.

[PICKFORD L.J. The point made by the appellants was that the ship had already suffered particular average damage, and that inasmuch as the damage which was done when she entered the dock was a consequence of a previous loss, therefore it is not a general average loss.]

A ship must always have sustained damage before a general average loss can be sustained.

[He was stopped.]

At the request of Lord Cozens-Hardy M.R. judgment was first delivered by

PICKFORD L.J. This is an appeal by the defendants from a decision of Bailhache J., who gave judgment for the plaintiffs for contribution in general average. I do not think it necessary

(1) 8 T. R. 186; 1 Sm. L. C., 12th ed., p. 443.

(2) [1899] 2 Q. B. 356, 359.

C. A. 1915

AUSTIN FRIARS STEAMSHIP COMPANY, LIMITED v. SPILLERS & BAKERS, LIMITED.

Pickford L.J.

to state the facts of the case at any length, because they are admitted and are accurately stated in the report of the case before Bailhache J. in [1915] 1 K. B. 833 and also in 20 Com. Cas. 100. Put shortly, they are these. The ship, which was chartered under a charter according to which average was to be paid according to the York-Antwerp Rules, on her voyage to Sharpness grounded on what I think was a rocky bank not far from her port of destination. Whilst she lay there, the whole adventure (ship, cargo, and freight) was in very considerable danger. It was therefore decided by the captain and pilot, in order to minimize that danger, to take her down the river and run her upon a mud-flat called Ackthorn. It was known to them that that would in all human probability cause damage to her. That mud-flat was lower down the river than the entrance to Sharpness Docks. It was then ebb tide, and at that state of the tide there was a certain danger in going into Sharpness Docks between the piers. Whilst she was going down the river, in consequence of certain matters discovered by the master and pilot, it was decided by them that it would be more dangerous to take her to Ackthorn and ground her there than to take her into Sharpness Docks; but it was known to both of them that it was practically certain, at that state of the tide, that in going into Sharpness Docks the ship herself would suffer damage, and they also realized that she might damage one of the piers. They certainly considered that, and the pilot said that in the state of things which then existed a thousand pounds or so more damage would make no difference to any one. They clearly contemplated that there would be damage and loss in all probability if they took the ship into Sharpness Docks. They took her in and damage was done both to the ship and to one of the piers, and liability was thereby incurred on the part of the ship to pay compensation to the harbour authority for the injury done to the pier. The plaintiffs claimed contribution in general average in respect of such damage and expenditure.

On that state of facts two questions are raised. It is said in the first place that taking the ship into the dock was not a general average act and consequently that there can be no general average loss, and therefore no contribution in general

average. It does not seem to be disputed that under the York-Antwerp Rules, if the ship had been voluntarily stranded on the mud-flat at Ackthorn where there was a certainty of damage, in order to avoid greater damage, that would have been a general average act, but it was said that going into the dock was not under the circumstances that existed a general average act. I confess that I am unable to follow that argument. It is said to be part of the whole consequences of the particular average loss, the particular average loss being the loss that was occasioned by the ship's first stranding upon the rocky bank above Sharpness. It seems to me that if a ship were there in a position which produced danger to the whole adventure, and, in order to minimize that danger, a voluntary act was done which occasioned damage to one of the elements of the adventure,—that is to say to the ship —that would be a general average act. It does not seem to me to make any difference in the present case that one of two things might have been done: the ship might have been stranded voluntarily upon the Ackthorn mud-bank or she might have been taken into port. Nor does it seem to me to matter that that port was her port of discharge. She would never have gone into her port of discharge under these circumstances but for the purpose of avoiding greater damage to the whole adventure. In my opinion in that case it is just as much an act done in the sacrifice of one of the elements of the adventure for the safety of the whole as if it were a port of refuge. I cannot see the difference for this purpose between a port of refuge and the port of discharge. Upon that point, which was really the main point, it seems to me clear that this was a general average act.

I do not think it is necessary to lay down any general principles of law as to what is a general average act in the case of voluntary stranding, but in the circumstances of this case it seems sufficient to say that in my opinion this was a general average act.

If that be so, then the only other question is whether the plaintiffs were entitled to contribution from the defendants not only for damage to the ship, but also for damage for which the ship is liable by reason of the injury done to the pier. Mr. Leslie Scott very fairly said that he could not see any reason in principle why the one should not be on the same footing as the other, and

C. A 1915

AUSTIN FRIARS STEAMSHIP COMPANY, LIMITED v. SPILLERS & BAKERS, LIMITED.

Pickford L.J.

I respectfully agree with him, because I can see no reason either. The artificial doctrine established by *Merryweather* v. *Nixan* (1) that there can be no contribution between joint tortfeasors is not applicable to this case, and is not a doctrine which one is anxious to extend further than is necessary. The judgment of Bailhache J. is, in my opinion, right, and I do not think it is necessary to say more than that I agree with what he said on that point and with his reasoning. I think, therefore, that the appeal should be dismissed.

LORD COZENS-HARDY M.R. I agree.

WARRINGTON L.J. I agree.

Appeal dismissed.

Solicitors: *Waltons & Co., for Batesons, Warr & Wimshurst, Liverpool; Botterell & Roche.*

(1) 8 T. R. 186; 1 Sm. L. C., 12th ed., p. 443.

W. I. C.

[IN THE COURT OF APPEAL.]

C. A.
1915
June 29, 30.

BARRON AND OTHERS *v.* POTTER AND OTHERS. POTTER, CLAIMANT.

Bill of Sale—Registration—Occupation of Grantor—Description—Bills of Sale Act, 1878 (41 *& 42 Vict. c.* 31), *ss.* 8, 10.

By s. 8 of the Bills of Sale Act, 1878, a bill of sale must be registered under the Act, otherwise as against a class of persons including execution creditors it is to be deemed fraudulent and void so far as regards the property in any chattels comprised therein and remaining after a certain time in the possession of the grantor.

By s. 10, sub-s. 2, a bill of sale must be registered as therein provided. Among other requisites the bill of sale, and a copy of the bill of sale, together with an affidavit of the time of such bill of sale being made or given, and of its due execution and attestation, and a description of the residence and occupation of the person making or giving the same, must be presented to and the copy and affidavit must be filed with the registrar within the time and in the manner therein prescribed.

In the affidavit filed with a bill of sale the grantor was described as a Baptist minister. He lived in Essex and was a qualified Baptist minister. Until four or five years before the making of the bill of sale he had been in regular occupation as a pastor, but had held no pastorate since. In the interval he had preached, lectured, and visited the poor, but not in connection with any particular church. Since making the bill of sale he had preached on several occasions in Chelmsford. He was a director of three or four companies and, with the assistance of a secretary, conducted his business in connection with them from an address in London:—

Held, that he was not properly described as a Baptist minister, and that the bill of sale was void as against execution creditors.

Luckin v. *Hamlyn* (1869) 21 L. T. 366 discussed.

APPEAL from the judgment of a Divisional Court (Lush and Atkin JJ.) on appeal from the county court of Essex holden at Maldon in an interpleader issue in which the plaintiffs were judgment creditors. The defendant William James Potter was the judgment debtor, and James Potter, the father of W. J. Potter, was the claimant.

The claimant relied upon a bill of sale dated July 17, 1913, by which W. J. Potter, the grantor, therein described as a "Baptist minister," purported to sell absolutely to the claimant, the grantee, the goods which were the subject-matter of the issue.

C. A. 1915

BARRON v. POTTER.

In the affidavit filed on the registration of the bill of sale it was stated that " the said William James Potter resides at Elysia, Woodham Ferris in the county of Essex, and is a Baptist minister." The facts as to his occupation were stated in the judgment of Atkin J. as follows: " The grantor of the bill of sale was a qualified Baptist minister. He had a regular occupation as pastor up to five years ago, that is up to about June, 1909, when he gave up the pastorate. Since then he had not had a pastorate. He had not a pastorate in July, 1913, though it is to be noted that he stated he could have had one if he liked. He said that his business was in connection with companies, and at the same time he was preaching at Chelmsford near where he resided. Being asked for details he said he preached for a fee in Chelmsford five Sundays in August, 1913, the month after the bill of sale was given. He said that since June, 1909, he had preached and lectured and visited the poor, but not in connection with a church. The only instances he gave of earning any money were the five fees in August, 1913. The evidence which was relied on as showing that his principal occupation was not that of a Baptist minister was this: When called, his first statement, presumably in answer to the ordinary question 'What are you?' was that he was a director of companies. In 1910 and 1911 he wanted capital for his business and obtained money on an absolute bill of sale from his sister-in-law. In 1913 he was engaged in litigation together with a trust company against Walcotts. In June, 1913, he required money to purchase the assets of a company in which he was interested which was in liquidation. In cross-examination he said that in June, 1913, and thereafter he was a director of companies. He was a director of three or four companies and conducted his business from Shaftesbury Avenue. His business was in connection with companies. It appeared from the father's evidence that the grantor had a secretary to whom on behalf of the grantor the father paid part of the consideration money of the bill of sale; that the father did not know what his son was in 1913, and that he did not know that he was a Baptist minister in 1913, though he knew he was a Baptist minister by rights; but that he had something in the City, though he did not know he was a company promoter."

The plaintiffs contended that the occupation of the grantor of the bill of sale ought to have been described as that of a director of public companies, and that the bill of sale was therefore void as against judgment creditors by virtue of s. 8 of the Bills of Sale Act, 1878. (1)

The county court judge held that the grantor was correctly described in the bill of sale, and gave judgment for the claimant. The plaintiffs appealed to the Divisional Court. The learned judges in that Court differed in opinion. Lush J. held that the county court judge had properly applied the test laid down by Martin B. in *Luckin* v. *Hamlyn* (2), namely, what was the business in which the grantor was usually engaged to the knowledge of his neighbours; and that the question whether the calling of a Baptist minister answered that test in this case was a question of fact upon which the decision of the county court judge was not to be overruled, as there was sufficient evidence to support it.

(1) Bills of Sale Act, 1878 (41 & 42 Vict. c. 31), s. 8: "Every bill of sale to which this Act applies shall be duly attested and shall be registered under this Act, within seven days after the making or giving thereof, and shall set forth the consideration for which such bill of sale was given, otherwise such bill of sale, as against . . . . all sheriffs' officers and other persons seizing any chattels comprised in such bill of sale, in the execution of any process of any Court authorizing the seizure of the chattels of the person by whom or of whose chattels such bill has been made, and also as against every person on whose behalf such process shall have been issued, shall be deemed fraudulent and void so far as regards the property in or right to the possession of any chattels comprised in such bill of sale which, at or after the time of . . . . executing such process . . . . and after the expiration of such seven days are in the possession or apparent possession of the person making such bill of sale . . . ."

Sect. 10: "A bill of sale shall be . . . . registered under this Act in the following manner: . . . . (2.) Such bill, with every schedule or inventory thereto annexed or therein referred to, and also a true copy of such bill and of every such schedule or inventory, and of every attestation of the execution of such bill of sale, together with an affidavit of the time of such bill of sale being made or given, and of its due execution and attestation, and a description of the residence and occupation of the person making or giving the same . . . . and of every attesting witness to such bill of sale, shall be presented to and the said copy and affidavit shall be filed with the registrar within seven clear days after the making or giving of such bill of sale, in like manner as a warrant of attorney in any personal action given by a trader is now by law required to be filed . . . ."

(2) 21 L. T. 366.

C. A. 1915

BARRON v. POTTER.

Atkin J. held that the grantor was not correctly described.

The judgment of Atkin J., which was affirmed by the Court of Appeal as hereinafter appearing, was as follows :—

1914. Dec. 18. ATKIN J. read the following judgment :— This is an appeal from the judgment of the county court judge at Maldon in an interpleader proceeding in which the appellants were judgment creditors and the respondent James Potter was the claimant, the subject of the interpleader being the goods of the judgment debtor, W. J. Potter, the son of the claimant, which had been taken in execution and were claimed by the claimant under a bill of sale, dated July 17, 1913, by which W. J. Potter purported to sell absolutely to the claimant for 100*l.* the goods in question.

The bill of sale was attacked on three grounds. First, that the transaction was fraudulent, that is, that there was no real sale at all; secondly, that the consideration was not truly stated; and thirdly, that the residence and occupation of the grantor were not truly stated upon registration.

The county court judge decided in favour of the claimant on all these points. The first two turn entirely upon questions of fact. The learned judge has found that the transaction was genuine, and that the 100*l.* was the real consideration. There is evidence upon which he could so find, and, therefore, we have no jurisdiction to inquire whether he was right or wrong.

The third point raises a question of general importance upon the construction of the Bills of Sale Act, 1878, affecting also bills of sale given by way of security for the payment of money. I have the misfortune to differ from my brother in respect of it, and proceed to state my own view.

The question arises upon s. 10, sub-s. 2, of the Bills of Sale Act, 1878. [The learned judge read s. 10, sub-s. 2, of the Act, and proceeded :]

It is plain that the residence and occupation have to be stated or verified in the affidavit filed on registration. It was suggested before us that the affidavit had not been put in at the county court. Whether upon registration being challenged it is for the claimant or the execution creditor to prove the due formalities

it is unnecessary to decide, for the point was not taken at the county court, and the point as to the invalidity of the registration was allowed to be argued without any objection. We came to the conclusion during the argument that the point was not a good one before us, and the appeal proceeded upon that footing.

Before considering the words of the sub-section it may be noted that the Bills of Sale Act, 1878, is entitled "An Act to consolidate and amend the law for preventing frauds upon creditors by secret bills of sale of personal chattels," and repeals the then principal Act of 1854, which had the same title, and by its preamble sets out somewhat more fully the mischief sought to be remedied. The section in question requires registration and a description on oath of "the residence and occupation" of the grantor. I read those words as meaning "the residence and the occupation of the grantor," and it is not in my view a right construction to read them as "the residence and an occupation" or "the residence and the occupation at the place of residence" or "the residence and occupation unless no one is likely to be misled by a non-description or misdescription of the residence and occupation." The occupation includes in my judgment the principal or substantial occupation of the grantor, and I know of no better definition of "occupation" in this context than the definition given by Kelly C.B. in *Luckin* v. *Hamlyn* (1): "The trade or calling by which the maker of the bill of sale ordinarily seeks to get his livelihood."

Now the object of the section has been as I consider authoritatively stated in a judgment of the Court of Exchequer Chamber in the year 1875 in *Larchin* v. *North Western Deposit Bank* (2): "The object of the Act is to give notice to all who are likely to deal with the grantor of the bill of sale; not to enable a person who is curious on the matter to trace him out, but to enable one who is asked to give him credit to know at once, by looking at the register, whether the person he is asked to give credit to has executed a bill of sale."

I do not pause now to consider the facts of that case, though they closely resemble the facts in this case, for in my view decisions on facts in particular cases are of very little value save

(1) 21 L. T. 366.

(2) (1875) L. R. 10 Ex. 64.

1914

BARRON v. POTTER.

Atkin J.

in so far as they lay down a guiding rule of construction. The above statement perhaps derives no increased authority from being adopted in the same year by the Court of Common Pleas in *Murray* v. *Mackenzie*. (1) The protection is for persons likely to become creditors in the future. The Legislature must have been aware in 1854, and in 1878, that many persons carry on their trade or business in places other than the places where they reside, and it appears to me wrong to hold that if a man carries on a business in, say, London where he is likely to seek credit he will satisfy the requirements of the statute by describing himself as of another and different occupation in which he may also be occupied at his residence in view of the fact that a business man must from time to time seek to incur credit from numerous people who have never heard, and never would inquire, and do not care where he resides. It was contended before us that the test of occupation at residence was adopted in certain cases, and reference was made to the words of Martin B. in *Luckin* v. *Hamlyn* (2), in which he said: "The word 'occupation' in this Act means the business in which a man is usually engaged to the knowledge of his neighbours. The intention is, that such a description should be given that if inquiry be made in the place where the person resides, he may be easily identified."

I think this statement of the intention of the statute is negatived by the more authoritative statement of the Court of Exchequer Chamber mentioned above. Reference was further made to the cases of *Feast* v. *Robinson* (3), a judgment of Romer J., and *Kemble* v. *Addison* (4), a judgment of Channell J., where again reference is made to neighbours. This might involve the Court in the further consideration of the true definition of "neighbours" upon which a wide construction was understood to be authoritatively placed many centuries ago. I myself can see no necessity for dragging in the neighbours, but if they are concerned, I think "neighbours" in this context includes those with whom a business man seeks to have business relations. It will be found, however, that the judgment of Channell J. is an express decision that an

(1) (1875) L. R. 10 C. P. 625, at p. 628.

(2) 21 L. T. 366.

(3) (1894) 63 L. J. (Ch.) 321; 70 L. T. 168.

(4) [1900] 1 Q. B. 430.

occupation carried on not at the place of residence must be described. I do not think the judgments in question decide the point as contended by the respondent. If they did I think they would be inconsistent with the judgment in the Exchequer Chamber, and would be wrong.

Nor in my judgment, if the description omits the true description of the occupation as defined above, does it matter whether the particular creditor or possible creditors in general are misled in fact, or are likely to be misled. The objection to the bill of sale can be taken though the creditor never looked at the register, and in my opinion can be taken though he looked at the register and recognized the grantor. He may have appreciated that the bill of sale was bad. Whether the description was likely to mislead or not may be quite a good test in a doubtful case of whether the description was an accurate one or not; but the statutory requirements do not depend upon such a test. In *Adams* v. *Graham* (1) the Court of Queen's Bench held that if the occupation is not described it is fatal even though the statute in the particular case operated cruelly and unjustly; see per Cockburn C.J.—"If the bill of sale is filed without a substantially strict compliance with its requirements, it is to be null and void" —per Lindley J. in *Murray* v. *Mackenzie* (2), adopted by the Court of Appeal in *Ex parte McHattie, In re Wood.* (3)

I myself am inclined to hold that, where a person exercises more than one trade or calling as an ordinary means of livelihood which brings him into contact with persons likely to deal with him and who would respectively only be likely to recognize him on the register by the description with which in fact he is seeking to deal with them, he must describe both occupations. This was decided in Ireland in *In re Fitzpatrick* (4) by Miller J., whose reasoning appears to me cogent, but it is unnecessary in my view to decide this point in this case. In any case I think the principal occupation whether carried on at the place of residence or elsewhere must be described.

Now applying the above test to the facts of this case it appears that the grantor of the bill of sale was a qualified Baptist minister.

(1) (1864) 33 L. J. (Q.B.) 71.
(2) L. R. 10 C. P. 625, at p. 629.
(3) (1878) 10 Ch. D. 398, at p. 405.
(4) (1886) 19 L. R. Ir. 206.

1914

BARRON v. POTTER.

Atkin J.

[The learned judge then stated the facts recited above and proceeded:]

Upon those facts it appears to me that the only evidence of the man's principal or indeed only "trade or calling by which he ordinarily sought to get his livelihood" was a business conducted in London in connection with companies. It clearly is what he thought was his business, for he so stated several times in evidence, and it further appears to me that the occupation of Baptist minister, if at that time it was for him an occupation at all, was not in 1913 and had not been for four years a calling by which he ordinarily sought to get his living.

The learned county court judge dealt with this part of the case in the following words:—"As to description, no doubt W. J. Potter was carrying on certain speculations in companies and shares, but he preached on Sundays as well. He was on the register as a minister. He could have been easily identified by reference to the register. I thought the description was a proper one."

If the test be as I have stated it, it would seem to me to follow that in any case the learned county court judge has not in this case applied his mind to the right test. Indeed I have no recollection of its being even contended before us that the county court judge intended to find that the grantor's principal occupation was that of a Baptist minister and that there was evidence to support such a finding. The contention relied upon was that occupation at the place of residence was sufficient together with a further contention which I will say a word about. However, as I am myself clearly of opinion that there was no evidence upon which the county court judge could find the calling of a Baptist minister to be the true occupation of the grantor within the meaning I have defined above, I think that his judgment for the claimant ought not to stand.

It remains to deal with the contention that the vocation of a minister is such as to justify the use of it as a description whatever other occupation the grantor may in fact follow. Some authority for this is sought in the judgment of Kay J. in *Sharp* v. *McHenry* (1), where he refers obiter to "Those cases where

(1) (1887) 38 Ch. D. 427, at p. 451.

a description is more or less indelible such as 'barrister' or 'surgeon.'" In my opinion if a barrister or surgeon is not ordinarily seeking his livelihood as a barrister or surgeon, but is seeking it in some other occupation such as in trade or commerce or railway employment or banking, he would have to describe the latter occupation. The question as to what will happen when an indelible description conflicts with a permanent occupation presents to my mind no difficulties. The definition of Kelly C.B. appears to supply a simple guide in the construction of this statute, and in my opinion it should be adhered to.

For the reasons I have given I think that this appeal should be allowed, but, as my brother thinks otherwise, it will be dismissed, and dismissed with costs.

The Court being divided in opinion, the appeal was dismissed and the claimant retained his judgment.

W. H. G.

The plaintiffs appealed.

1915. June 29, 30. *J. J. Parfitt, K.C.*, and *C. Wertheimer*, for the appellants. The description of the occupation of W. J. Potter, the grantor of the bill of sale, is not correctly given either in the bill of sale or in the affidavit. He is described as a Baptist minister, whereas his real occupation was that of a promoter and director of public companies: see *Barron* v. *Potter* (1), where his relations to a company are described. He carried on this business from an office in Shaftesbury Avenue of which he was lessee, although his companies also used it as their address. He describes himself in his evidence as a director of companies. He borrowed this money in order to buy the assets of one of his companies. The word "occupation" in the Act means the business occupation of the grantor, so that any one who makes inquiries about him may be able to find out whether he has already given a bill of sale. In the present case the description "Baptist minister" was not accurate, for he had given up practice in that line; but, in any

(1) [1914] 1 Ch. 895.

C. A. 1915

BARRON v. POTTER.

case, it was not the description intended by the Act, for it would only tend to conceal who the real grantor was: *Luckin* v. *Hamlyn* (1), which is the foundation of all the cases on this subject; *Larchin* v. *North Western Deposit Bank* (2): *Murray* v. *Mackenzie* (3); *Ex parte National Mercantile Bank* (4); *In re Fitzpatrick.* (5) The Act requires information which will be useful to the people with whom the debtor would be brought into business relations. The question is not whether the description is misleading or not, but whether it is an accurate description of the trade or business by which the grantor gets his living. It must be a business definition. If a man has two occupations he must describe them both: *Sharp* v. *McHenry* (6); *Kemble* v. *Addison* (7); *Feast* v. *Robinson.* (8) At all events the place of business ought to be stated as well as the residence. There was no evidence on which the judge could find that the grantor was a Baptist minister and nothing else. [They also referred to *Ex parte Southam.* (9)]

David, K.C., and *E. H. Tindal Atkinson*, for the respondent. This is an attempt to upset an honest transaction upon a technical objection. The bill of sale and affidavit filed on registration contain a description of the residence and occupation of the grantor within s. 10, sub-s. 2, of the Bills of Sale Act, 1878. It is not necessary to state all the grantor's residences; it is sufficient to give the place where he lives: *Greenham* v. *Child* (10); *Hewer* v. *Cox.* (11) "The object of requiring an affidavit is to identify the grantor": per Mathew J. in *Greenham* v. *Child.* (12) The onus of proof that the omission to describe the grantor otherwise than as a Baptist minister was intended or calculated to deceive is upon the person who impugns the validity of the bill of sale on such ground: *Throssell* v. *Marsh.* (13) Here there was no intention to deceive and no one has been deceived. The grantor's occupation has been truly

(1) 21 L. T. 366.
(2) L. R. 10 Ex. 64.
(3) L. R. 10 C. P. 625.
(4) (1880) 15 Ch. D. 42.
(5) 19 L. R. Ir. 206.
(6) 38 Ch. D. 427.
(7) [1900] 1 Q. B. 430.
(8) 63 L. J. (Ch.) 321.
(9) (1874) L. R. 17 Eq. 578.
(10) (1889) 24 Q. B. D. 29.
(11) (1860) 3 E. & E. 428.
(12) 24 Q. B. D. 29, at p. 30.
(13) (1885) 53 L. T. 321.

stated: *Sharp* v. *McHenry* (1); *Luckin* v. *Hamlyn* (2), which was approved in *Ex parte National Mercantile Bank* (3); *Feast* v. *Robinson* (4); *Kemble* v. *Addison* (5); *Neverson* v. *Seymour*. (6) The grantor is a Baptist minister and so appears from the Baptist Year Book for 1915. In the Directory of Directors for 1913 the grantor's name does not appear in the list of directors.

[LORD COZENS-HARDY M.R. referred to *In re Monolithic Building Co.* (7)]

The Courts have always been very reluctant to construe s. 10 of the Act of 1878 strictly: per Wright J. in *In re Davies*. (8)

Ellis Hill, for the Sheriff of Essex.

J. J. Parfitt, K.C., was not called upon to reply.

LORD COZENS-HARDY M.R. This is an appeal from the Divisional Court, in which there was a difference of opinion. The question arises whether a bill of sale has complied with the provisions of the Bills of Sale Act, 1878. When I say bill of sale I mean, of course, the affidavit as well as the bill of sale. The facts on which the point arises are these. W. J. Potter was until five years before the transaction in question a Baptist minister in charge of a church, but during the period of five years before the transaction in question he had no regular charge. He lived in the country, in Essex, at a place called Woodham Ferris, which is not far from Chelmsford. Having no regular charge as a minister, he was minded to do what I suppose he was perfectly entitled to do, to start a business elsewhere of his own. He took an office in Shaftesbury Avenue, and from that office he launched (or whatever you please to call it) several companies. In the course of his business there he incurred several debts, and, amongst others, a debt to the execution creditors in the present case, in this sense, that it was his conduct as director of one of these companies which led Warrington J. (as he then was) to hold that his attempt to get

(1) 38 Ch. D. 427, 449.
(2) 21 L. T. 366.
(3) 15 Ch. D. 42, 54.
(4) 63 L. J. (Ch.) 321.
(5) [1900] 1 Q. B. 430.
(6) (1907) 97 L. T. 788.
(7) [1915] 1 Ch. 643.
(8) (1897) 77 L. T. 567, at p. 568.

C. A. 1915

BARRON v. POTTER.

Lord Cozens-Hardy M.R.

rid of his other directors by holding a meeting on the platform of a railway station was a transaction which could not be supported; and relief was granted to the plaintiff against the defendant which involved the payment by the defendant of considerable costs. In addition to carrying on that business he, not regularly but occasionally, did duty as a Baptist minister, preaching on Sundays. And it is a perfectly well understood matter that many ministers of various denominations when they are doing duty for other ministers of their own body receive as payment a certain fee. To my mind it is idle to suggest that the occasional fees which Potter may have received for preaching on Sundays at some Baptist chapels produced his livelihood, or was in any sense of the term the real occupation of his life at that time.

Now, we have to consider the meaning of a few words in s. 10 of the Bills of Sale Act, 1878. That section provides for the execution of a bill of sale, and it says: [His Lordship read sub-s. 2 of s. 10 and continued.] Therefore it is plain that unless a description of the residence and occupation of the person giving the bill of sale is given the bill of sale cannot be relied upon as against an execution creditor. Here the bill of sale was given by Potter five years after he had ceased to be a regular Baptist minister, in which and in the affidavit filed on registration he was described only as of Woodham Ferris, a Baptist minister. There was nothing whatever referring to his business address in Shaftesbury Avenue; nothing whatever referring to the nature of his business there carried on, which would be probably more accurately described as a promoter of companies, or perhaps it might be said that his business was what I believe is colloquially described as that of a "guinea pig," who is a man who lives upon directors' fees from the companies for which he acts. But one way or another, the place where he carried on that business was in Shaftesbury Avenue, it was not carried on at the place where his residence was, and his occupation cannot by any stretch of language, it seems to me, be treated as that of a Baptist Minister. It is said, "Oh, but if you look at the Baptist Year Book for 1915 you will find," as you do, "Potter's name is given as that of a man who had until 1909

a regular pastorate." But he has had no pastorate since that date, and his private address is given as Elysia, Woodham Ferris, Chelmsford.

Unless I am bound by authority, I must say that this seems to me a clear case. The learned county court judge appears to have treated the matter as though it turned upon whether if you went down to the place where he lived—his residence—you would have no difficulty in finding that he was the man who gave the bill of sale, and that the description was sufficient to find him and to identify him. I think the answer is this: If you could simply have the address without any occupation at all, you would have no difficulty in finding the man who lived at this Elysia. That cannot be the test. The Act is quite specific. You must not only have the residence but you must have the occupation of the man. Unless I am forced by authority I am certainly not prepared to hold that a man who five years ago was a regular Baptist minister, and who has since occasionally done duty on Sundays for other Baptist ministers, is a man of whom it can fairly be said that his occupation is that of a Baptist minister.

Now, is there any authority to the contrary? In my opinion there is not. In the Divisional Court great stress was laid upon *Luckin* v. *Hamlyn* (1), in which Kelly C.B. and Martin B. gave judgments, and it was suggested that those judgments were inconsistent with one another; and one member of the Court below relied on the judgment of Kelly C.B., and the other on the judgment of Martin B. I think that it is doing scant justice to those learned judges to say that there was that discrepancy and difference between them. Now, what were the facts in that case? There a woman at the time of giving the bill of sale in question carried on a farm which had belonged to her deceased husband, but did so merely as executrix to wind up the estate and not with a view to taking over the farm, and it was held that in her occupation of the farm she could not be described as a farmer, but that she was sufficiently described as a widow. Just consider further the facts of that case. Her husband had been a master of a workhouse, and she was the matron. He died in 1868, just

(1) 21 L. T. 366.

C. A. 1915

BARRON v. POTTER.

Lord Cozens-Hardy M.R.

after he had taken the farm. The widow was executrix and universal legatee. The bill of sale was made in January, 1869, that is to say, less than a year after her husband's death, and it was thereon argued that the bill of sale was void because this widow executrix was described as a "widow," and not as a "farmer." One's common sense, I think, shows that when an executor is left and has vested in him as executor a farm with growing crops, and I know not what else, upon it, he does not become a farmer in the sense that his occupation is that of a farmer because he does that which it is his plain duty to do, and which it is necessary he should do, of carrying on the farm for the current year and of disposing of the things that have been grown upon it. I will read both the judgment of Kelly C.B. and the judgment of Martin B. Kelly C.B. says: "This is a question of the meaning to be put upon the word 'occupation' in the Act of Parliament. In my opinion it means the trade or calling by which the maker of the bill of sale ordinarily seeks to get his livelihood. In this case the maker of the bill of sale had been married a short time to the master of a workhouse, who, a month or so before his death, had taken a farm, and who died leaving the farm as part of his assets. It thus came into her hands as executrix of his will, and she was put to the alternative of abandoning it altogether, or sowing it with seed and cultivating it till disposed of. She did not do this personally, her previous life and habits rendering her incapable of so doing; but she employed a bailiff to carry on the farm for her. I do not think she could be, with the least propriety, described as a farmer; she did not carry on the business of farming as her ordinary means of livelihood, and that, I think, is what the Act means by the term 'occupation.'" Martin B. says: "The word 'occupation' in this Act means the business in which a man is usually engaged to the knowledge of his neighbours. The intention is, that such a description should be given that if inquiry be made in the place where the person resides, he may be easily identified. I am quite sure that if this woman had been inquired for in her place of residence as a farmer, that it would only have tended to mislead. One of her neighbours himself said in his evidence that she did not carry on any business. I am quite satisfied on the evidence that this

woman was no more a farmer within the meaning of the Act than I am." Now, it seems to me that though there is possibly some difference of expression between the two learned judges, in principle there is no difference between them. The judgment of Kelly C.B. is perfectly clear in support of the decision in the Court below of Atkin J.; that of Martin B., in the first or guiding sentence of his judgment, is precisely the same. "The word 'occupation' in this Act means the business in which a man is usually engaged to the knowledge of his neighbours." I have some difficulty in understanding what is the meaning of the words "of his neighbours." I think they mean little more than this: A man can become a partner secretly in a business without any one knowing it, and that, it may be, is not a case to which the language of Martin B. might be aptly applied. But in a case like this where a man is a tenant of an office, or place of business, in Shaftesbury Avenue, where he carries on a business and where the liability is incurred for which the execution creditor is seeking to seize goods and which the execution creditor knows about, to say that that is not his occupation is to my mind not a thing one is bound to do by anything that is said in *Luckin* v. *Hamlyn*.(1) I do not think it is really necessary to go through the numerous cases to which our attention has been called, which, as it seems to me, confirm the view with perfect clearness that the occupation referred to in s. 10 of the Act of 1878 is such an occupation as Potter was carrying on in Shaftesbury Avenue; he was plainly getting his livelihood by the business he was there carrying on, and was not getting his livelihood to any appreciable extent by what he did on Sundays. For these reasons I think the view taken by Atkin J., with all deference to Lush J., was the more correct, and that the decision of the county court judge was wrong, and that the appeal must be allowed.

PICKFORD L.J. I agree. If it were not for the fact that we are differing from the county court judge as well as from one of the judges in the Court below, I should not go so fully into the matter. I may say at once that I entirely agree with the

(1) 21 L. T. 366.

C. A. 1915

BARRON v. POTTER.

Pickford L.J.

judgment of Atkin J. and with the reasons upon which it is founded.

The question arises upon s. 10, sub-s. 2, of the Bills of Sale Act, 1878. That sub-section requires, putting it briefly, that a bill of sale and a copy shall be filed, and an affidavit containing, amongst other things, a description of the residence and occupation of the person giving the bill of sale. A point was taken in the Divisional Court, and taken though not very boldly here, that in this case the affidavit had not been put in and that the case had proceeded wrongly upon the question what was the description in the bill of sale itself, and that therefore this point could not be taken as the affidavit was not before the Court. That was disposed of in the argument in the Divisional Court. Atkin J. refers to it and he says, quite conclusively I think, that such a point as that ought to have been taken in the county court, if taken at all, and that it is not competent for a party to allow the argument upon the correctness of the description to proceed there as though all the materials were before the Court, and for both the parties to treat the case as though the evidence were before the Court, and then for one of them to come here and say "I cannot find technically that the affidavit was before the Court." I think such a point cannot prevail; and I quite agree with the Divisional Court in saying there was nothing in it.

Now, coming to the only point before us, namely, whether there was in this case a description—and by that I mean of course a correct description—of the residence and occupation of the person giving the bill of sale, that is whether the description of this gentleman as a Baptist minister was a sufficient description of his occupation. I do not at all say, broadly, that wherever a man has more than one occupation, or may be said to occupy himself in more than one pursuit, it is necessary that every one of them must be put in the affidavit. It must depend on the circumstances. A man may have what one may call his occupation and be doing some other things which are entirely subsidiary and which cannot be called his occupation at all; and in that case it might not be necessary to describe them; but there certainly may be cases, it seems to me, and there are cases,

in which it is necessary that more than one occupation should be described. In the cases to which we have been referred there are several in which more than one occupation has been given in the affidavit because the man was carrying on more than one; and I think you cannot say, broadly, that it is always necessary to mention everything a man is doing, or, broadly, that he has only one occupation. You must look at each case to see whether it is necessary or not to mention more than one occupation.

In this case, as I have said, the grantor of the bill of sale was described as a Baptist minister. The position was this: He was a Baptist minister in this sense, that he was on the list of ministers, I think it is called. By the Baptist Year Book for 1915, which was produced before us, we see that in order that a man should be placed upon the list of ministers he has to undergo a somewhat searching examination, or else to have some other qualifications. Once put on the list of ministers he remains there until he is removed. What the power of removal is I do not have to ascertain, but there is one. This gentleman was on the list of ministers. He had held a pastorate up to five or six years ago, and then he had given it up, and occasionally did clerical duty after he had given it up. Now, if that were the whole of the case it would be quite right to describe him as a Baptist minister, although he held no pastorate at the time. But that was not by any means the whole of it; it was only a small part of it. Because what the gentleman was doing was this: he had an office in Shaftesbury Avenue where he conducted the business of some companies of which he was director. Whether he was promoter of them or not, I do not know, nor do I think it matters. But he had an office to which he went regularly. The money that he had got on this bill of sale was wanted for that very business; and he occasionally, when he was not engaged in the business at Shaftesbury Avenue, took some duty for other Baptist ministers, he preached, and got fees for preaching from time to time.

I think there is evidence, though it is rather loose, that he occasionally did some other pastoral work in the way of visiting, but it is very slight indeed; and he only did that work when he was not occupied in this business of attending to these companies

C. A. 1915

BARRON v. POTTER.

Pickford L.J.

in this office at Shaftesbury Avenue. And looking first at the evidence of the claimant, who is his father, he said this: "Until twelve months ago I knew nothing of the affairs of my son. He then came and told me how he stood. I don't know what he was in 1913; I did not know he was a Baptist minister in that year. He is a Baptist minister by rights, but he has something in the City. In June, 1913, I did not know he was a company promoter." That is what the claimant says of him. Then it is curious, although I do not attach very much importance to it, that in the judge's note the very first description given to the grantor is "William John Potter, director of companies." I presume that was an answer given by himself when he was asked "What are you?" It is something, but I do not attach too much importance to it, because one has to look at the facts and not at any one expression used. But still it is odd he should have described himself as a director of companies. Then the grantor describes a previous bill of sale, and he says this: "In 1910 and 1911 I wanted capital for my business and gave an absolute bill of sale jointly with my wife to Miss Whittingham, my sister-in-law." Now for what business was that bill of sale given? Was it for his business of occasionally taking clerical duty by preaching or occasionally visiting, or was it for his business in Shaftesbury Avenue? That was in 1910. In cross-examination he said, "In July, 1913, I was a director of companies, and I am now. I have been, and still am, a Baptist minister. I was preaching on some Sundays at that time. I had not got a pastorate in July, 1913. It is a correct description of me. I had regular occupation as a pastor up to five years ago. I was then also a director of three or four companies and conducted my business from Shaftesbury Avenue. My business was in connection with companies. At the same time I was preaching Sunday by Sunday in this very town." Then he says, "I had not a pastorate in July, 1913. I might have had one if I had wished." And then he describes what I have already referred to, the way a man may be removed from the list of ministers.

Now, he kept a secretary. We have not been told definitely what the secretary's duties were, but it is inconceivable that the secretary should have been kept for simply casual and occasional

instances of clerical duty which he performed. I have no doubt the secretary was kept for the purpose of his business. Those are the facts as deposed to by the claimant and the grantor himself.

It seems to me it is impossible to say that to describe this man as a Baptist minister and nothing else was a description of the occupation. Tests have been applied as to whether the description is sufficient for his neighbours to identify him as the man who gave the bill of sale. Of course in a case like this one question would be, "Who are his neighbours?" He has two sets of neighbours. He has one set of neighbours in the place where he lives in Woodham Ferris in the county of Essex, and he has another set of neighbours in his business premises in Shaftesbury Avenue; and if the description is to be such as to identify him to his neighbours, I do not know why one set of neighbours should be considered more than another set of neighbours. But again, dealing with detail and not with principle, we have nothing to show that his neighbours anywhere would have said, if they had been asked, what this man was. They might have said, "We knew him as a Baptist minister"; but it is quite as likely they would have said, "Well, he was a Baptist minister, and still does some duty; but he gave up his pastorate. Since then he has been carrying on some business in London in connection with companies." It is just as likely they would have said one thing as the other. But it seems to me that it is a fallacy to say you can apply as an absolute test whether the description is sufficient for his neighbours to identify him by. You might leave out his occupation altogether and simply state his name and residence and yet persons might be able to identify him. It is all subject to the primary requirements of the section of the Act of Parliament that there should be a description of the residence and occupation. A great many cases have been cited to us in which different criteria have been applied to ascertain what is a sufficient description, but there is lying at the bottom of them all this, there must be a description of the man's occupation. I should certainly be inclined to think that if a man has more than one occupation which may be called substantially his real occupation then more than one ought to be mentioned. But I do not think

C. A. 1915

BARRON v. POTTER.

Pickford L.J.

it is necessary to decide in this case whether the description of "company director" without "Baptist minister" would have been sufficient; the question is whether "Baptist minister" without "company director" is sufficient. Both the learned judges in the Court below referred to, and both relied upon, the decision in *Luckin* v. *Hamlyn.* (1) Lush J. relied on a portion of the judgment of Martin B. as supporting the proposition that if there is a description of some occupation, which would enable the grantor's neighbours to recognize him, that is sufficient. I agree entirely with what the Master of the Rolls has said, that there is really no difference between the judgment of Kelly C.B. and that of Martin B., but as the judgment of Martin B. is relied upon as applying a different test, I think it is worth while to look at another decision of that learned judge, and I think it will then be quite plain that he did not intend to apply any different test. In the case of *Sharp* v. *McHenry* (2) Kay J. says: "Now the question as to what is a proper description of a grantor of a bill of sale came before a judge for whose strong common sense we all have a great respect, Mr. Baron Martin. It was not decided under this very Act of Parliament, but under an Act containing similar words. I refer to the case of *Tuton* v. *Sanoner*." (3) Then he reads what the learned judge in that case says and what I propose to read. Martin B. says: "We think that question" (whether the description was sufficient) "has already been concluded by the case of *Allen* v. *Thompson* (4), and if the matter were to come before us de novo, we should be of the same opinion. The witness had an occupation which ought therefore to have been stated. The definition (in Webster's Dictionary) of 'an occupation' is—'the principal business of one's life; vocation; calling; trade; the business which a man follows to procure a living or obtain wealth,'" which does not mean necessarily that he thereby obtains a livelihood but follows it in order to get one if he can. That was a definition approved by Martin B., and his approval was indorsed by Kay J.; and that applies just the same test which in my opinion is the right one, namely, what is really the man's occupation.

(1) 21 L. T. 366.
(2) 38 Ch. D. 427, at p. 449.
(3) (1858) 3 H. & N. 280, 282.
(4) (1856) 1 H. & N. 15.

In this case it seems to me, on the facts I have stated, that it is impossible to say that the description of this gentleman as a Baptist minister described the principal business of his life, his vocation, his calling, his trade, or the business which he followed to procure his livelihood. He had given up his pastorate; he had taken an office in London where he carried on the business of certain companies; and he speaks throughout his evidence perfectly frankly of "his business," "his business" being that business he was carrying on in Shaftesbury Avenue, and of wanting money for his business; and I think that on those facts his occupation was not correctly described as that of a "Baptist minister" and nothing else. Lush J., I think, accepted the proposition that this was a question of fact, and had been found by the learned county court judge, and that his finding could not be disturbed. I agree that it is a question of fact, but I think one must look and see whether the learned county court judge had any evidence upon which he could find that this was a description of the grantor's occupation. I think, looking at the facts I have stated, there was no evidence upon which he could so find. He could find it was a description of an occupation, but he could not find it was the description or the correct description of this grantor's occupation. The learned county court judge, I think, with the greatest respect, has taken rather an erroneous view of the effect of the evidence; and by that I do not mean to say that he has come to a wrong conclusion in fact upon it, but I do not think he has appreciated really, speaking with the greatest respect, what the evidence was, because he says, "As to description. No doubt W. J. Potter was carrying on certain speculations in companies and shares, but he preached on Sundays as well. He was on the register as a member. He could have been easily identified by reference to the register. I thought the description was a proper one." Now, if that represented the proper construction of the evidence I do not know that one could differ from it. A minister of whatever denomination is no less a minister, and no less has an occupation as a minister, because he occasionally speculates in companies; but if he only occasionally speculates in companies it would not be right to describe him as a director of or a speculator in

C. A. 1915

BARRON v. POTTER.

Pickford L.J.

companies; nor I think would he be necessarily wrongly described by his clerical calling if he was in fact merely a director of a company. But that is a wholly different state of things to what existed here, where a man had an office for the purpose of carrying on business in connection with the companies and spoke of it himself regularly as "his business," and the business for which he wanted capital. I think the learned county court judge has taken an erroneous view of the evidence, and that the evidence properly looked at does not afford any ground upon which it can be said that to describe this gentleman as a Baptist minister and nothing else was a correct description. I agree that the appeal should be allowed.

WARRINGTON L.J. I agree; and as we are differing from the judgment of the county court judge and Lush J., I will endeavour to express very shortly the view which I take on the question. Now, the Bills of Sale Act, 1878, avoids, as against an execution creditor, a bill of sale unless it complies with certain provisions of the Act, one of these being that it shall be registered under the Act. The provisions with regard to the registration under the Act involve the requirement that there shall be filed at the time of registration an affidavit containing, amongst other things, a description of the residence and occupation of the person making or giving the bill of sale. The execution creditors in the present case say that the affidavit filed with the bill of sale did not contain a correct description of the man's occupation. The question is whether that contention is correct or not. Now, I may say this, speaking for myself, that in one sense no doubt the objection is a technical one inasmuch as it is an objection to the effect that certain technical requirements of the Act have not been complied with. But in another sense, and in this case, I do not regard the objection as a technical one in any sense at all. It seems to me that this particular requirement of the Act is one of very considerable importance; and that in this particular case the omission to fulfil that requirement was a matter of substance.

Now, the only question to which the Court, as it seems to me, has to direct its attention in the first instance is what is meant

by the occupation of a man? Until you ascertain that you cannot determine whether his occupation has been described or not. I do not propose to read again the authorities which have been referred to on that point. It is sufficient to say that in my opinion a man's occupation is the trade or calling by which he ordinarily seeks to get his livelihood. If that calling involves the doing of one set of acts which is usually described by one collective term, and the doing of another set of acts which is usually described by another collective term, then I think his occupation cannot properly be described unless both those collective terms are used. I do not mean to say, of course, that if a man's calling can be substantially described by the one term it would be an improper description because he incidentally happens to perform another set of acts. That is to say, if a man is a tradesman and at the same time earns a little money by writing occasional articles in a magazine, that would be a mere side-show, to use a popular expression, which probably would not be involved in the term "occupation." But each case must depend on its own circumstances. And I think it is safe to say this at all events, that in substance the affidavit must state that which is his real occupation, that which is the real substantial calling by which he ordinarily seeks to get his livelihood. Now, has that requirement been complied with in the present case? I think quite plainly not. The man himself states his business is that which he carries on at Shaftesbury Avenue; the description which he gives of himself is that of a director of companies, both when he first appeared in the witness-box and in answer to the first question in cross-examination. He required capital for his business; he borrowed this particular money for a purpose connected with his business. Can it possibly be said that a description which omits all reference to that business is a description of the man's occupation? Such a contention seems to me to be perfectly hopeless. With all respect to the learned county court judge, I do not think he has addressed himself to the question which he really had to determine. I think he has thought it sufficient, having found the man's name in the list of Baptist ministers, to treat that calling—that of a Baptist minister—as the man's occupation. If I had to express any opinion

C. A. 1915

BARRON v. POTTER.

Warrington L.J.

on the subject, my inclination would be to say that the calling of a Baptist minister was in this case a side-show, and that the words "promoter and director of companies" would have been a sufficient description. But as to that I need not express any definite opinion. All that it is necessary to say is that the description of the man's occupation as that of a Baptist minister is insufficient.

Appeal allowed.

Solicitors: *Bartlett & Gluckstein; Doyle, Devonshire & Co., for Jones & Son, Colchester; Gepp & Sons.*

W. I. C.

C. A. 1915 *July* 5.

[IN THE COURT OF APPEAL.]

READ, HOLLIDAY & SONS, LIMITED *v.* MIDLAND RAILWAY COMPANY AND NORTH EASTERN RAILWAY COMPANY.

Practice—Railway and Canal Traffic—Undue Preference—Through Rates—Joinder of all Railway Companies Parties to Through Rates as Defendants—Railway and Canal Traffic Act, 1854 (17 & 18 *Vict. c.* 31), *s.* 2; *Railway and Canal Traffic Act*, 1888 (51 & 52 *Vict. c.* 25), *s.* 27.

Messrs. Read, Holliday & Sons, Limited, alleged that the Midland Railway Company were charging them rates for goods carried over their railways in excess of the rates charged to their competitors in business, and applied to the Railway and Canal Commission Court for an order on the Midland Railway Company to stop this preference. They added the North Eastern Railway Company as parties on the ground that they had an agreement with the Midland Railway Company for charging through rates for traffic over their lines. The North Eastern Railway Company applied for an order that their name should be struck out of the proceedings on the ground that no question of through rates was involved and no relief could be asked against them. The Railway and Canal Commission refused the application on the ground that it had been settled by previous decisions of the Commissioners that where it was desired to investigate questions of through rates it was necessary that all the railway companies who were parties to the rates should be before the Court:—

Held, on appeal, that there was no settled practice of the Commission, where a through rate had to be investigated, to insist on all the parties

to that rate being brought before them; and that where no order could be made against a defendant company, and their presence would not be a convenience to anybody, they ought not to be made parties.

C. A. 1915

READ, HOLLIDAY & SONS, LIMITED v. MIDLAND RAILWAY AND NORTH EASTERN RAILWAY.

APPEAL from a decision of the Railway and Canal Commissioners.

This was a summons by the North Eastern Railway Company asking that their name as defendants should be struck out of an application by Read, Holliday & Sons, Limited, against the Midland Railway Company and the North Eastern Railway Company and all subsequent proceedings therein. The facts alleged by the applicants were stated in their application as follows: "1. The applicants are a company incorporated under the Companies Acts, carrying on business as aniline dye and chemical manufacturers, at Huddersfield in the county of York. 2. The applicants for the purposes of their business purchase large quantities of crude coal tar naphtha at collieries situated near the stations set out in the schedule hereto, which stations are each of them on the lines of the defendants, the Midland Railway Company, and the said naphtha is and has been despatched to the applicants by the vendors of the same from the said collieries over the lines of the defendants, the Midland Railway Company, and thence delivered to the applicants at Huddersfield. 3. The defendants, the Midland Railway Company, before August, 1910, charged, and since August, 1910, have charged, the applicants, in respect of the said traffic from the said collieries to Huddersfield, the rates set out in part A of the schedule hereto. 4. The defendants, before August, 1910, charged, and since August, 1910, have charged Major & Co., Limited, of Hull, and Messrs. Sadler & Co., of Middlesbrough, competitors of the applicants for the carriage of similar traffic from the said collieries to Hull and Middlesbrough respectively, the rates set out respectively in parts B and C of the schedule hereto. 5. The rates charged to and payable by the said competitors since August, 1910, or, in the alternative, the portion of such rates belonging to the defendants, the Midland Railway Company, constitute an undue preference of the said competitors by the defendants, or, in the alternative by the defendants, the Midland Railway Company, and the applicants are thereby

C. A. 1915

READ, HOLLIDAY & SONS, LIMITED v. MIDLAND RAILWAY AND NORTH EASTERN RAILWAY.

subjected to an undue and unreasonable prejudice or disadvantage in their business aforesaid. 6. The applicants, therefore, apply to this Court under the provisions of the above Acts, and in particular under section 2 of the Railway and Canal Traffic Act, 1854, and sections 10 and 12 of the Railway and Canal Traffic Act, 1888, to hear and determine the matters herein complained of, and the applicants claim:—1. An order directing the defendants respectively, or, in the alternative, the defendants, the Midland Railway Company, to desist from giving any undue or unreasonable preference or advantage to the applicants' said competitors, and enjoining the defendants respectively, or, in the alternative, the defendants, the Midland Railway Company, from subjecting the applicants to any undue or unreasonable prejudice or disadvantage. 2. An enquiry as to the damages sustained by the applicants by reason of the said undue or unreasonable preference, or by reason of the said undue or unreasonable prejudice to which the applicants have been subjected."

The schedule gave the names of various places with their distances from Huddersfield, Hull, or Middlesbrough, and the rates charged.

A similar application was made by Read, Holliday & Sons, Limited, against the Great Central Railway Company, the Lancashire and Yorkshire Railway Company, the London and North Western Railway Company, and the North Eastern Railway Company; and there was also a summons asking that the name of the North Eastern Railway Company should be struck out of these proceedings. The two summonses came on for hearing together.

The Railway and Canal Commission dismissed the summons on the ground that it had been settled by previous decisions of the Commissioners that where it was desired to investigate questions of through rates it was necessary that all the railway companies who were parties to the rates should be before the Court.

The North Eastern Railway Company appealed.

G. J. Talbot, K.C., and *W. A. Robertson*, for the appellants. The question in these cases is between the applicants and the

Midland Railway Company only. The question of a through rate is not involved in it and there is no reason why the North Eastern Railway Company should be parties. The Railway and Canal Commission relied upon *Mapperley Colliery Co.* v. *Midland Ry. Co.* (1) and *Chance & Hunt* v. *London and North Western Ry. Co.* (2); but the key to those decisions is the word "interested" used in the judgment in the former case. Here the only railway company interested is the Midland Railway Company. Other companies cannot be added as parties merely to enable the Court to obtain information from them which could be obtained equally well by interrogatories. To enable them to be joined there must be a claim for relief against them. The argument from undue preference cannot be introduced in this case: *Grayson, Lowood & Co.* v. *Great Central and other Ry. Cos.* (3)

Disturnal, K.C., and *F. J. Wrottesley*, for Read, Holliday & Sons. The general rule to be followed in these cases was laid down in *Chance & Hunt* v. *London and North Western Ry. Co.* (2) and ought to be followed. It is absolutely necessary in such cases as this to inquire into the through rates over the entire route. Under s. 27 of the Railway and Canal Traffic Act, 1888, the railway company has to show that there is no undue preference. The duties of railways as to through traffic are provided for by s. 2 of the Railway and Canal Traffic Act, 1854, and s. 25 of the Act of 1888. On these points the Commission always makes general orders and leaves it to the railway companies to work them out. But if it should turn out that there has been an undue preference a declaration might be made against all the parties.

G. J. Talbot, K.C., replied.

LORD COZENS-HARDY M.R. This is an appeal from a decision of the Railway Commissioners arrived at after considerable difficulty. An application was made by the North Eastern Railway for a declaration that they ought not to be brought into

(1) (1896) 9 Ry. & Ca. Tr. Cas. 147.

(2) [1909] 1 K. B. 550; 13 Ry. & Ca. Tr. Cas. 286.

(3) (1909) 13 Ry. & Ca. Tr. Cas. 281.

C. A. 1915

READ, HOLLIDAY & SONS, LIMITED v. MIDLAND RAILWAY AND NORTH EASTERN RAILWAY.

Lord Cozens-Hardy M.R.

this litigation between Read, Holliday & Sons and the Midland Railway Company. Now, who are Read, Holliday & Sons? They are carrying on business in Huddersfield. With whom do they deal so far as this application is concerned? They deal only with the Midland Railway Company. Their contracts are made with the Midland Railway Company to carry goods to or from Huddersfield from or to certain stations of the Midland Railway. But the case they make is this: they say there is an undue preference because goods go by through rate partly over the line of the Midland Company and partly over the line of the North Eastern Company to Hull and Middlesbrough, and they say: "Comparing these through rates with rates charged to us who only use your line, you are charging us more than you are charging other people who send to destinations on the North Eastern Railway."

The application asks for an order that the defendants respectively (that is the two defendants, the Midland Railway Company and the North Eastern Railway Company), or in the alternative the Midland Railway Company, shall "desist from giving any undue or unreasonable preference or advantage to the applicants' said competitors, and enjoining the defendants, or, in the alternative, the defendants the Midland Railway Company, from subjecting the applicants to any undue or unreasonable prejudice or disadvantage."

I ventured to put a question to counsel for the applicants, who certainly did not satisfy me, if I may say so, that he could give any answer to the question, which was "What relief can you get on this application against the North Eastern?" It seems to me quite plain that he cannot get any. They have not any contract with the applicants, nor do they surcharge them in any way. The utmost that can be said is that the Midland Company charge Read, Holliday & Sons certain rates which are said to be excessive, when compared with certain rates charged as through rates arranged between the Midland Company and the North Eastern Company, but there is no privity, if I may use such a term, in reference to such a statutory obligation, between Read, Holliday & Sons and the North Eastern Railway Company which enables the Court to give any direct relief against the North Eastern

Company on this application. On principle, therefore, it seems to me that the appellants are right. It cannot, on principle, be right to say that another company against whom I am not in a position to claim anything should be made a party to the proceedings, and that I can say "I will bring them here according to what is said to be the settled practice of the Railway and Canal Commission." We have been referred to two authorities on which Lush J. relied, and two only, for the third case does not seem to me to bear upon the point. The first case, *Mapperley Colliery Co.* v. *Midland Ry. Co.* (1), is a case which can be passed by, because it was a case of joint rates. The next case does give rise to considerable difficulty. That is the case of *Chance & Hunt* v. *London and North Western Ry. Co.* (2) In principle, speaking for myself, I do not think that case can be compared with the present one. The facts may be shortly stated: "The applicants complained, inter alia, of certain through rates charged to certain competitors in respect of the carriage of goods over the railways of the defendants and other companies from stations on the railway of the defendants to stations on the railways of such other companies, whereby they alleged that such competitors were unduly preferred." The only respondents, the London and North Western Railway Company, for some reason which is not apparent, took out a summons to this effect: either to strike out all reference to other companies, or to let them be joined as co-defendants. Lawrence J. referred to *Mapperley Colliery Co.* v. *Midland Ry. Co.* (1) in the course of the case, and he forced the applicants either to strike out all reference to other companies or to join the other companies. It is put in this way (3): "It is quite possible that the London and North Western Railway Company may be charging precisely the same mileage rate in every case. That being so, I am not prepared to say that they are guilty of an undue preference, at any rate unless and until all the parties are before the Court, so that we may see how the rate is compounded in respect of each of the routes in question. Mr. Disturnal contends that as they are in each case

(1) 9 Ry. & Ca. Tr. Cas. 147.
(2) [1909] 1 K. B. 550; 13 Ry. & Ca. Tr. Cas. 286.
(3) [1909] 1 K. B. 550, 553; 13 Ry. & Ca. Tr. Cas. 286.

C. A. 1915

READ, HOLLIDAY & SONS, LIMITED v. MIDLAND RAILWAY AND NORTH EASTERN RAILWAY.

Lord Cozens-Hardy M.R.

the company making the contract, that is enough to make them responsible; but in my view that is not sufficient to lead to the conclusion that they are the company giving the undue preference, if any." Sir James Woodhouse makes a remark which is the one which has given me the most difficulty in this case (1): "I think in the examination of all these questions of rates, and especially of through rates, the balance of convenience makes it desirable that all the parties concerned in the making of the rate should be before the Court." It is not put upon a legal ground, but upon the balance of convenience. With the greatest possible respect, I do not think that it can be right on the balance of convenience to hold that in every case, even where the applicants themselves do not desire it and protest against it, they should be forced to bring before the Court other railway companies against whom no relief is sought, and against whom no relief, in my opinion, can be sought. I do not think we ought to regard the practice as so established as a rule of convenience that it ought to be acted upon in every case as a matter of course. Applying it to the present case, counsel for the respondents answered a question which Pickford L.J. put to him: "What advantage do you propose to get by having the North Eastern Railway Company added?" by saying "I do not know." That answer seems to me to show that we are not justified in saying that the North Eastern Railway Company can be, or are, proper parties to an application like this, where an experienced counsel in these matters tells us he cannot understand what advantage is to be obtained by having them present. I think we ought to add that it ought not to be an invariable rule of the Railway Commissioners that in every case every company interested in a joint rate which is said to be evidence of an undue preference against the applicants by one particular railway company should be before the Court. There may be cases where it is proper to do so, but on the facts of this case I have no hesitation in saying that we should be wrong in keeping the North Eastern Railway Company here when every information required to enable the applicants to establish the case can be established

(1) [1909] 1 K. B. 550, 553; 13 Ry. & Ca. Tr. Cas. 286.

and proved either by subpœnaing some officers of the company, or obtaining discovery from the Midland Railway Company itself as to the amount it received in respect of the through rate, or by adopting other various modes which an applicant in every case at law has open to him to establish his case. In my opinion this appeal should be allowed.

PICKFORD L.J. I agree. This is an application by Read, Holliday & Sons, complaining of undue preference by the Midland Railway Company. It is true technically that in the first prayer they ask for an order directed to the defendants respectively—that is to say the Midland and the North Eastern Railway Companies—or in the alternative the Midland Railway Company, to desist from undue preference. That is really a complaint of undue preference by the Midland Railway Company. The applicants seek to establish it by the comparison of a rate charged by the Midland Railway Company in respect of certain traffic from certain collieries to Huddersfield with a rate which is alleged to be charged by both the defendants to certain competitors for traffic from the same collieries to Hull and Middlesbrough. As a matter of fact it is not charged by the defendants but by the Midland Railway Company to those competitors, and they are the company with which the contract is made. It is a through rate, as I understand, established by the Midland Company in conjunction with the North Eastern Railway Company. Therefore what the tribunal will have to do will be to ascertain whether a comparison of those two rates, so far as they concern the Midland Company, shows that there has been undue preference by the Midland Company. If there has not been, then there will be no order at all. But I cannot see any combination of circumstances by which there can be an order against the North Eastern Company. Counsel for the applicants entirely failed to convince me by the instances he gave of any combination of circumstances in which such an order should be made. It will, I daresay, be necessary to investigate and perhaps to split up the through rate in order to see what the position of the Midland Railway Company with regard to it is, as was the case of the North Western Company in the case of *Chance & Hunt* v.

C. A. 1915

READ, HOLLIDAY & SONS, LIMITED v. MIDLAND RAILWAY AND NORTH EASTERN RAILWAY.

Pickford L.J

London and North Western Ry. Co. (1) For that purpose it is said that the North Eastern Railway Company are proper defendants to this application. It seems to me on principle that that cannot be right. It is not the case that a man is a proper defendant to either an application or a writ if no relief of any sort or description can be obtained against him. It is not because he is indirectly concerned and affected by an order that may be made that therefore he is a proper party to the action. Therefore, I do not think in principle that the North Eastern Railway Company are proper defendants to the action. But it was said that it is a regular and settled practice in the Railway Commission that where there is a through rate to be investigated every railway company which is concerned in that through rate must be a party to the proceedings. I am not familiar with the practice of the Railway Commission, and certainly if that were a settled practice I should not wish to interfere with it. If a practice has once been settled by a tribunal of that description, in my opinion it is a mistake to interfere with it. But I am not satisfied that there is a practice established that in all cases of this kind all the railway companies concerned in a through rate must be parties to the proceedings. There are some general observations in cases on through rates which show that as a matter of convenience it is proper they should be before the Court, and I do not in the least wish to say that there may not be cases in which they may be quite proper parties. But I do not see that the two or three cases to which we have been referred establish such a practice. I do not wish to say that they never may be made parties. I do not wish to say, and I do not say, that they must be always parties. There may be cases in which they ought to be parties, but there are cases in which they ought not.

Now, what is the state of things in this particular case? The North Eastern Railway Company object to being parties. Railway companies and individuals do object to being made parties to proceedings with which they have no concern. The applicants, I think, acting upon what they thought was the practice, have joined the North Eastern Railway Company. The applicants

(1) [1909] 1 K. B. 550; 13 Ry. & Ca. Tr. Cas. 286.

can get no order against them, and when they are asked "What is the convenience of your having them here?" they are unable to say that there is any convenience or advantage to them at all. No doubt information may be necessary from the North Eastern Railway Company. That can be got, if necessary, without making them parties. Probably, I should think, all the information necessary would be got by discovery from the Midland Railway Company, but if not, the information can be obtained from the North Eastern Railway Company. The applicants' counsel is quite unable to point out to us any way in which the Court, or himself, or anybody else, would be convenienced by the North Eastern Railway Company being made parties. In that case, I think, they ought not to be parties. There are general observations, as I have said, in the case of *Chance & Hunt* v. *London and North Western Ry. Co.* (1) which might go to show that they ought in every case to be parties. I do not think that those remarks go so far as that. If they do go so far as that I respectfully cannot agree. On the principle of no one being made a party where no order can be made against him, and where the person who has joined him is wholly unable to point out any convenience which is occasioned to any one—either the Court or the parties—I cannot think under those circumstances it can be right and proper that he should be a party. I agree, therefore, that this appeal must be allowed.

Warrington L.J. I agree. The real claim made in this case by the applicants is that the Midland Railway Company are charging the applicants a rate at such an amount, and are charging the competitors a rate at such an amount as that the Midland Railway Company are giving an undue preference to the competitors. That claim involves a comparison of the treatment which the Midland Railway Company metes out to the applicants and the treatment which the same company metes out to competitors. Otherwise it seems to me impossible for the applicants to establish that the Midland Railway Company is guilty of the offence under the Railway and Canal Traffic Act, 1854, of giving an undue preference

(1) [1909] 1 K. B. 550; 13 Ry. & Ca. Tr. Cas. 286.

C. A. 1915

READ, HOLLIDAY & SONS, LIMITED v. MIDLAND RAILWAY AND NORTH EASTERN RAILWAY.

Warrington L.J.

to one person over another. It happens, however, that the rate which the Midland Railway Company is charging to the competitors is part of a through rate, in which through rate the North Eastern Railway Company is interested; and the applicants have, in deference to what they think is the practice of the Railway Commission, joined the North Eastern Railway Company as a defendant to these proceedings. The North Eastern Railway Company say "We are not giving undue preference to any one over you, for we have no dealings with you." I think I am right in saying that, and under no circumstances in these proceedings could the applicants obtain any relief against the North Eastern Railway Company. The North Eastern Railway Company say "We do not want to be made defendants. We ask to have our name struck out," and in principle it seems to me they are right. I have read the words in the application which purport to ask for relief against both the railway companies, but in fact no relief is sought against the North Eastern Railway Company, and on principle I should have thought it was unquestionable that they should not be made parties. But it is said that there is a general and established practice of the Railway Commission which amounts to this: that wherever a through rate, under whatever circumstances, comes to be discussed, then all the companies which are parties to the through rate ought to be parties to the proceedings. In my opinion no such practice has been established. The two cases which have been referred to do not establish any such general practice at all.

Then one has further to consider this: If the only suggestion is convenience, one has to find out whether there is any substance in the alleged convenience. Counsel for the applicants in answer to a question put to him by Pickford L.J. says that he cannot say that it will be any convenience to him to have the North Eastern Railway Company there. If the applicants cannot say what convenience to them it would be to have the North Eastern Railway Company there, any argument founded on convenience seems to me to disappear altogether. I am far from saying, even if they were in a position to contend that it would be convenient to them to have the North Eastern Railway Company there, that that would be sufficient ground for making a person party to a

litigation with which he has nothing to do, and in which no relief can be asked against him. I agree that the appeal ought to be allowed.

C. A. 1915

READ, HOLLIDAY & SONS, LIMITED v. MIDLAND RAILWAY AND NORTH EASTERN RAILWAY.

LORD COZENS-HARDY M.R. The appeal will be allowed with costs here and below; and the same order will be made in the other case.

Appeal allowed.

Solicitors: *R. F. Dunnell; Van Sandau & Co., for Mills & Co., Huddersfield.*

H. C. R.

[IN THE COURT OF APPEAL.]

C. A. 1915 *July* 19, 20, 30.

BEAL *v.* HORLOCK.

[1915 B. 1222.]

Ship—Seaman—Wages—Termination of Service—Detention in Enemy Port—"Loss of the ship"—Hague Conventions, 1907, *No. VI. — Merchant Shipping Act*, 1894 (57 & 58 *Vict. c.* 60), *ss.* 143, 158.

A British ship, during the voyage for which a British seaman had signed articles, being in a German port when war was declared between the United Kingdom and the German Empire, was detained and not allowed to leave and the crew were imprisoned; and the ship and crew were still detained and imprisoned when this action for an allotment of wages was commenced:—

Held by Swinfen Eady and Bankes L.JJ., Phillimore L.J. dissenting, that in the circumstances it had not been shown that the service of the seaman was terminated by the "loss of the ship," within s. 158 of the Merchant Shipping Act, 1894, or upon the ground that the further performance of the contract had become impossible as a commercial adventure, and that therefore he continued to be entitled to wages.

Decision of Rowlatt J., [1915] 3 K. B. 203, affirmed.

APPEAL from the judgment of Rowlatt J. at the trial of the action without a jury; reported ante, p. 203.

The action was brought by the wife of a seaman for moneys alleged to be due under an allotment note entitling her to be paid a certain sum per month out of the seaman's wages. The action

C. A. 1915

BEAL v. HORLOCK.

was tried upon an agreed statement of facts which is set out in the report of the case in the Court below.

Rowlatt J. gave judgment for the plaintiff for the amount of the allotment note down to the date of the writ. (1)

The defendant appealed.

George Wallace, K.C., and *Raeburn*, for the defendant. By s. 143, sub-s. 1, of the Merchant Shipping Act, 1894 (2), the person in whose favour an allotment note is made may, unless the seaman is shown, in manner in this Act specified, to have forfeited or ceased to be entitled to his wages, recover the sums allotted; and by sub-s. 2 the seaman shall be presumed to be duly earning his wages unless the contrary is shown to the satisfaction of the Court (inter alia) "(*d*) by such other evidence as the Court in their absolute discretion consider sufficient to show satisfactorily that the seaman has ceased to be entitled to the wages out of which the allotment is to be paid." It has been

(1) The writ was issued on April 10, 1915.

(2) 57 & 58 Vict. c. 60, s. 143:

"(1.) The person in whose favour an allotment note under this Act is made may, unless the seaman is shown, in manner in this Act specified, to have forfeited or ceased to be entitled to the wages out of which the allotment is to be paid, recover the sums allotted, when and as the same are made payable, with costs from the owner of the ship with respect to which the engagement was made, or from any agent of the owner who has authorised the allotment, in the same Court and manner in which wages of seamen not exceeding 50*l.* may be recovered under this Act . . . .

"(2.) In any proceeding for such recovery it shall be sufficient for the claimant to prove that he is the person mentioned in the note, and that the note was given by the owner or by the master or some other authorised agent; and the seaman shall be presumed to be duly earning his wages, unless the contrary is shown to the satisfaction of the Court, either—

. . . . . .

"(*d*) by such other evidence as the Court in their absolute discretion consider sufficient to show satisfactorily that the seaman has ceased to be entitled to the wages out of which the allotment is to be paid."

Sect. 158: "Where the service of a seaman terminates before the date contemplated in the agreement, by reason of the wreck or loss of the ship, or of his being left on shore at any place abroad under a certificate granted as provided by this Act of his unfitness or inability to proceed on the voyage, he shall be entitled to wages up to the time of such termination, but not for any longer period."

shown that the seaman has ceased to be entitled to his wages. The service of the seaman terminated when the ship was detained on the outbreak of war on August 4, or at any rate when the crew were removed to a lodging ship in Hamburg on November 2, or when they were interned at Ruhleben on November 8. Subject to the provisions of s. 30 and following sections of the Merchant Shipping Act, 1906 (6 Edw. 7, c. 48), the defendant might have discharged the seamen at Hamburg. The detention of the ship will continue during the war, which may last a considerable time, and the termination of which is quite uncertain. It is not like the case of a mere temporary embargo on the ship, as in *Hadley* v. *Clarke* (1) and *Beale* v. *Thompson.* (2) In the latter case, which was an action by a seaman for wages, the ship was eventually released, the voyage was completed, and the freight earned at the time of action brought, and the seaman was held to be entitled to recover his wages during the period of detention. In such cases the Court was influenced by the old doctrine of law that freight was the mother of wages, and that therefore wages were only recoverable when the freight was earned. This doctrine was finally abolished by the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), s. 183, an enactment which is now embodied in s. 157 of the Merchant Shipping Act, 1894. That consideration therefore no longer applies. In the present case the detention of the ship and crew was an act of war, which an embargo is not, and it rendered the further performance of the contract with the seaman impossible as a commercial adventure, and terminated the contract: *Ford* v. *Cotesworth* (3); *Geipel* v. *Smith* (4); *Jackson* v. *Union Marine Insurance Co.* (5); *Cunningham* v. *Dunn* (6); *Embiricos* v. *Reid & Co.* (7); though it is not suggested that everything which puts an end to the adventure as regards the cargo owner also puts an end to it as regards the seaman. The distinction between an embargo and a hostile seizure is pointed out in *The*

(1) (1799) 8 T. R. 259.
(2) (1804) 4 East, 546; affirmed in the House of Lords (1813) 1 Dow, 299.
(3) (1870) L. R. 5 Q. B. 544.
(4) (1872) L. R. 7 Q. B. 404, at p. 414.
(5) (1874) L. R. 10 C. P. 125.
(6) (1878) 3 C. P. D. 443.
(7) [1914] 3 K. B. 45.

C. A. 1915

BEAL v. HORLOCK.

Boedes Lust (1) and in *The Teutonia.* (2) See also *Esposito* v. *Bowden.* (3) The act of the German Government prevented the parties from carrying out the contract, and each party is absolved from the further performance of it: *Melville* v. *De Wolf.* (4) The seaman, therefore, under s. 143, sub-s. 2 (*d*), of the Merchant Shipping Act, 1894, has ceased to be entitled to his wages. [*The Friends* (5) was also referred to.]

Further, there was a "loss of the ship" within the meaning of s. 158 of the Merchant Shipping Act, 1894. In *The Olympic* (6) there was a "wreck" of the ship within s. 158 though she was only detained for nine weeks in effecting repairs. "Wreck" means "anything happening to the ship which renders her incapable of carrying out the maritime adventure in respect of which the seaman's contract was entered into": per Buckley L.J. (7) Vaughan Williams L.J. took the same view. (8) The word "loss" in this context must have a similar meaning. The detention of the ship has the same effect as capture, which terminates the seaman's service: *Sivewright* v. *Allen.* (9) In *Austin Friars Steam Shipping Co.* v. *Strack* (10) there was no "loss" of the ship within s. 158, because the capture was caused by the wrongful act of the owners in carrying contraband unknown to the crew. In *Andersen* v. *Marten* (11) Lord Halsbury expressed approval of the statement of Lord Mansfield in *Goss* v. *Withers* (12) that "the ship is lost by the capture though she be never condemned at all, nor carried into any port or fleet of the enemy." The plaintiff is therefore not entitled to recover. [*Polurrian Steamship Co.* v. *Young* (13) was also referred to.]

F. A. Greer, K.C., and *A. Neilson*, for the plaintiff. The defendant has not shown to the satisfaction of the Court that the seaman has ceased to be entitled to his wages within s. 143 of the Merchant Shipping Act, 1894. The seaman was not discharged at Hamburg because the conditions required by ss. 30 and 31

(1) (1804) 5 C. Rob. 233, at p. 246.
(2) (1871) L. R. 3 A. & E. 394, at pp. 412, 413.
(3) (1857) 7 E. & B. 763, at p. 792.
(4) (1855) 4 E. & B. 844.
(5) (1801) 4 C. Rob. 143.
(6) [1913] P. 92.
(7) Ibid. at p. 107.
(8) Ibid. at p. 103.
(9) [1906] 2 K. B. 81.
(10) [1905] 2 K. B. 315.
(11) [1908] A. C. 334, at p. 340.
(12) (1758) 2 Burr. 683, at p. 694.
(13) [1915] 1 K. B. 922.

of the Merchant Shipping Act, 1906, were not complied with. Nor were the conditions of s. 32 of the Act of 1906 complied with. The only possible cause which can be said to have terminated the seaman's service is the "loss of the ship" within s. 158 of the Act of 1894. The section does not say that the loss of the adventure will terminate the service. There was no "loss of the ship" within s. 158. Kennedy L.J. in *The Olympic* (1) said that "what is true of an embargo by the Government to which the ship belongs is true also of seizure for a temporary purpose by a hostile power." An embargo is a temporary detention of the ship, and does not put an end to the seamen's contract for wages: *Beale* v. *Thompson* (2); *Thompson* v. *Rowcroft* (3); *Pratt* v. *Cuff* (4); *Delamainer* v. *Winteringham.* (5) The seizure, to put an end to the right of the seamen to wages, must result in the permanent loss of the vessel to the owners, as by condemnation terminating the ownership of the vessel. The first two articles of the Hague Convention No. VI. of 1907 (6) show that there has only been a temporary detention of the vessel. The Court must assume that the vessel will be released under the terms of that Convention, and that the seamen will also be released and will navigate her home. The vessel is not physically lost, nor is it lost to its owners. Cases between shipowner and cargo owner or between shipowner and underwriter, which deal with the termination of the commercial adventure, have no bearing upon the question whether the engagement of the seamen has been determined. The engagement of the seaman has therefore not been determined. But even if the engagement of the seaman has been determined, the seaman's right to wages has not determined. There has been no wreck or loss of the ship within s. 158, nor has there been any discharge of the seaman under the terms of the contract or under the provisions of the Act, and therefore the seaman is entitled to be paid his wages under s. 134 (*c*) until "final settlement": *Lloyd* v. *Sheen* (7);

(1) [1913] P. 92, at p. 111.
(2) 4 East, 546.
(3) (1803) 4 East, 34, at p. 43.
(4) (1798) cited in *Thompson* v. *Rowcroft*, 4 East, at p. 43.
(5) (1815) 4 Camp. 186.
(6) Set out in the judgment of Swinfen Eady L.J.
(7) (1905) 93 L. T. 174.

C. A. 1915

BEAL v. HORLOCK.

Palace Shipping Co. v. *Caine.* (1) It has not been shown that the seaman has ceased to be entitled to his wages, and therefore under s. 143, sub-s. 2 (*d*), the plaintiff is entitled to be paid the allotment [*Curling* v. *Long* (2) and *The Elizabeth* (3) were also referred to.]

Raeburn in reply. If at the time of action brought it cannot be said that the seaman is ready and willing to perform the service he has agreed to perform, he cannot recover: *Button* v. *Thompson.* (4) The further performance of the seaman's contract had become impossible, and therefore he could not be said to be ready and willing to perform it. That is sufficient to show that the seaman has ceased to be entitled to his wages within the meaning of s. 143, sub-s. 2 (*d*), of the Merchant Shipping Act, 1894. With regard to s. 134 (*c*), that clause really imposes a penalty for non-payment of the seaman's wages where this is caused by the wrongful act or default of the owner or master, and it does not continue the seaman's wages, in the proper sense of the term, until final settlement. There was no such wrongful act or default here.

Cur. adv. vult.

July 30. SWINFEN EADY L.J. read the following judgment:— This is an appeal from the judgment of Rowlatt J. in an action brought by the wife of a seaman upon an allotment note. She obtained judgment for the amount due to her up to the issue of the writ, and from this judgment the defendant appeals.

No question is raised as to the regularity of the allotment note, but the action has been brought to determine the liability of a shipowner, whose ship has been detained in Germany, for the payment of the wages of the crew who have been removed from their ship and are now interned in Germany.

The plaintiff's husband, Tom Rea Beal, signed articles as second mate on board the *Coralie Horlock* on May 21, 1914, at Hull. The articles were for a voyage of not exceeding two years' duration to any ports or places within the limits of 75 degrees

(1) [1907] A. C. 386.
(2) (1797) 1 Bos. & P. 634.
(3) (1819) 2 Dods. 403.
(4) (1869) L. R. 4 C. P. 330, at p. 348.

north and 60 degrees south latitude, commencing at Hull, proceeding thence to Alexandria, and/or any other ports within the above limits, trading in any rotation, and to end at such port in the United Kingdom or Continent of Europe (within home trade limits) as might be required by the master. His wages were 9*l.* 10*s.* a month, and he stipulated for an allotment note of 4*l.* 15*s.* monthly, which was issued and is payable to the plaintiff.

The vessel sailed from Hull at the end of May, 1914, and proceeded to Alexandria and thence to other ports, arriving at Hamburg on August 2, 1914. At the outbreak of war on August 4, 1914, the vessel was still at Hamburg. She has ever since been detained by the German Government. The crew remained on board as prisoners until November 2, when they were transferred, with the crews of other vessels in a like position, to three lodging ships; they were removed thence to Ruhleben near Berlin on November 8, and have since remained there.

The plaintiff contends that she is entitled to recover upon the allotment note, and that the wages of her husband are payable under the articles until he shall be discharged in accordance therewith, and pursuant to the provisions of the Merchant Shipping Acts. The defendant contends that he is not liable for the payment of any wages after August 4, 1914.

Arts. 1 and 2 of the Hague Convention No. VI. of 1907 are applicable to the ships of belligerents which are in an enemy port at the outbreak of war. They are as follows: Art. 1: "When a merchant-ship belonging to one of the belligerent Powers is at the commencement of hostilities in an enemy port, it is desirable that it should be allowed to depart freely, either immediately, or after a reasonable number of days of grace, and to proceed, after being furnished with a pass, direct to its port of destination or any other port indicated to it. The same principle applies in the case of a ship which has left its last port of departure before the commencement of the war and has entered a port belonging to the enemy while still ignorant that hostilities have broken out." Art. 2: "A merchant-ship which, owing to circumstances beyond its control, may have been unable to leave the enemy port within the period contemplated in the

C. A. 1915

BEAL v. HORLOCK.

Swinfen Eady L.J.

preceding article, or which was not allowed to leave may not be confiscated. The belligerent may merely detain it, on condition of restoring it after the war, without payment of compensation, or he may requisition it on condition of paying compensation." Thus art. 2 provides that a ship in the position of the *Coralie Horlock* may not be confiscated. In the absence of any evidence to the contrary, it must be presumed that she is merely detained, on condition of being restored after the war. There is no evidence of any proceedings against the ship in prize in the German Courts.

The provisions with regard to the advance and allotment of seamen's wages are contained in ss. 140—143 of the Merchant Shipping Act, 1894, and s. 62 of the Merchant Shipping Act, 1906. The plaintiff has proved, pursuant to s. 143, sub-s. 2, that she is the person mentioned in the note, and that the note was given by the owner or by the master or some other authorized agent. Her husband, therefore, is to be presumed to be duly earning his wages, unless the contrary is shown to the Court, as provided for by sub-s. 2. The only clause of sub-s. 2 alleged to be applicable is clause (*d*): "by such other evidence as the Court in their absolute discretion consider sufficient to show satisfactorily that the seaman has ceased to be entitled to the wages out of which the allotment is to be paid."

The question therefore is: Has it been shown satisfactorily that the seaman has ceased to be entitled to his wages.

A seaman may be discharged abroad, pursuant to s. 30 and following sections of the Merchant Shipping Act, 1906, but it is not suggested that such discharge has taken place in the present case. The discharge of seamen in the United Kingdom is provided for by ss. 127—130 of the Merchant Shipping Act, 1894, but it is not suggested that the seaman has been discharged in manner provided by those sections. The time of payment of wages in the case of foreign-going ships is provided for by the Merchant Shipping Act, 1894, s. 134, and by clause (*c*), "In the event of the seaman's wages or any part thereof not being paid or settled as in this section mentioned, then, unless the delay is due to the act or default of the seaman, or to any reasonable dispute as to liability, or to any other cause not being

the wrongful act or default of the owner or master, the seaman's wages shall continue to run and be payable until the time of the final settlement thereof." The defendant does not even allege that the seaman's wages have been paid or settled in manner mentioned in the section, or indeed at all, even for the period expiring on August 4, 1914. The right to wages has not been suspended under ss. 159 and 160, nor has the Court been asked to exercise the power of rescinding contracts conferred by s. 168.

It has been contended that the service of the seaman has terminated by the "loss of the ship," as provided for by s. 158, and that the seaman was only entitled to wages up to the time of such termination. It is urged that there was a "loss of the ship," either when it was first detained with the crew on board as prisoners, or, if not, when the crew were removed to the lodging ships, or, if not, when the crew were removed to Ruhleben. There has been a detention of the ship, but there is no evidence of confiscation or attempted confiscation, and it would be directly contrary to art. 2 of the Hague Convention No. VI. of 1907 for the ship to be dealt with. In the case of a German ship, detained under similar circumstances in England, *The Chile* (1), the President made an order for "detention," but abstained from adjudging that the vessel "be condemned and sold," and until it is known what course is being taken by the German Government with regard to ships detained it cannot be decided whether the *Coralie Horlock* is lost or not.

It is well settled that when a ship is detained under an embargo, although for a lengthened period, the contract with the seamen is not at an end. The ship although detained cannot be treated as lost. In *Hadley* v. *Clarke* (2) the shipper was held entitled to recover damages against the shipowner for non-performance of his contract to carry goods from Liverpool to Leghorn, on the ground that the embargo placed on the vessel only suspended, and did not dissolve or put an end to, the contract between the parties. The ship was detained at Falmouth by an Order of His Majesty in Council of July 27, 1796, placing an embargo on all ships bound for Leghorn, until the

(1) [1914] P. 212. (2) 8 T. R. 259.

C. A. 1915

BEAL v. HORLOCK.

Swinfen Eady L.J.

further order of the Board of Privy Council. It was not until October 24, 1798, that the embargo was wholly taken off so far as related to ships bound to Leghorn; so the embargo lasted about two years and three months. Lord Kenyon C.J. said (at p. 265): "It would be attended with the most mischievous consequences if a temporary embargo were to put an end to such a contract as this; because, if it were to have that effect, it must also have the effect of putting an end to all contracts for freight and for wages." Lord Kenyon also referred to other events which might occasion a long interruption of a voyage, but which would not put an end to the contract, and the language used by him both at the commencement and at the end of his judgment is applicable to the present case. At the commencement of his judgment he said: "Whenever a case comes before us that is likely to be attended with hardship to the parties, a struggle naturally arises in our minds to find out (if possible) some way of extricating all the parties from it. In the present case, both parties are innocent; and whatever may be our decision, one party or the other must suffer. In such a situation we must explore our way as well as we can; but we must determine according to the principles of law." At the end of his judgment he says: "I cannot feel myself justified by any principle of law to say, that the contract was put an end to by this temporary embargo; but I am of opinion that, however hard or inconvenient it may be to the defendants, the plaintiff is entitled to recover." Grose J. said (at p. 267): "If the embargo dissolved the contract, when did the dissolution take place? The mere stating of the question puts an end to all further inquiry; the defendant's counsel could not show at what precise time the contract was dissolved; and if this contract were dissolved by the embargo, it would be followed by the very alarming consequence stated at the bar, that all the contracts between the owner and the mariners would also be put an end to."

Again, *Beale* v. *Thompson* (1), affirmed in the House of Lords (2), shows that, although a vessel be detained for a long period under an embargo, on ultimate release and return home the seamen are entitled to their wages. In that case the men

(1) 4 East, 546.

(2) 1 Dow, 299.

had been taken from their ship by the Russian Government and interned for upwards of six months, but established their right to wages for the whole period they were so detained. Again, in *Delamainer* v. *Winteringham* (1) the same point was raised. The ship had been detained in Russia under the Emperor Paul's embargo, and the men interned in the country; on the release of the ship and crew, the crew returned with the ship to this country, and a seaman sued for his wages, the declaration containing counts for work and labour. It was urged that the plaintiff could not recover the wages under counts for work and labour, as during the whole of the time in question he had been at a distance from the ship, and had done no service as a mariner. Lord Ellenborough, however, decided that the plaintiff's return to the ship and completion of the voyage removed all difficulty. He said: "The action is maintainable on the ground that there was no severance of his services; and therefore, in contemplation of law, he was working and labouring for the defendant from the commencement to the conclusion of the voyage."

It is true that these cases were determined when the rule of maritime law that "freight is the mother of wages" was the law of this country, and by statute it is now provided that the right to wages shall not depend on the earning of freight; but the alteration of the law is in favour of the seaman.

In the case of *The Olympic* (2), which was a claim by the crew for wages, although Kennedy L.J. differed from the other members of the Court upon the question of fact, whether the damage occasioned to the *Olympic* was sufficient to amount to "the wreck of the ship" within s. 158 of the Merchant Shipping Act, 1894, his judgment contains a careful statement of the law with regard to the effect of an embargo. He said (at p. 111): "The embargo which prevents a laden ship from proceeding from port on her voyage does not dissolve the mariner's engagement, any more than it dissolves the contract between the shipowner and the merchant whose cargo has been loaded." He then refers to a passage in Lord Tenterden's Law of Merchant Ships and Seamen, and adds: "In this sentence one of the greatest of

(1) 4 Camp. 186.

(2) [1913] P. 92.

C. A. 1915

BEAL v. HORLOCK.

Swinfen Eady L.J.

judicial authorities on matters of shipping clearly indicates his opinion even in the case of the embargo of a laden ship—i.e., in the case of an obstacle to the prosecution of the voyage imposed by the Government, an obstacle of indefinite and unascertainable duration (which the detention for repairs is not)—that, while, in his own interest and in order to save himself the risk of expense, it may be a reasonable and indeed very prudent step on the part of the shipowner to discharge the greater part of the crew, yet, if that step is taken, the shipowner must compensate those whom he so discharges for the loss of the wages during the unfulfilled residue of the contract period, unless, as is likely enough, they find equally remunerative employment in another ship." He then continues: "And I may add that what is true of an embargo by the Government to which the ship belongs is true also of seizure for a temporary purpose by a hostile power." The present detention more resembles an embargo, or a seizure for a temporary purpose, than a capture and condemnation. In the case of *The Friends* (1), where the seaman failed to maintain his claim to wages, the ship in which he had been serving was captured by the French, and Sir William Scott said: "Nothing can be better settled than that the act of capture defeats all rights and interests." But that was a capture at sea, as prize, by an enemy ship.

In the recent case of *Polurrian Steamship Co.* v. *Young* (2) the steamship *Polurrian* was captured by Greek men-of-war, her cargo removed from her and used for coaling the Greek fleet, and the ship was detained from October 25, 1912, until December 8, 1912, when she was released without having been brought before a Prize Court. The shipowners failed in their claim upon the policy for a constructive total loss, based upon "the capture," and certainly the mariners' wages did not cease to be payable.

In the present case the defendant has, in my judgment, failed to establish the loss of the ship.

It was then contended that there had been a "wreck or loss" of the ship, within s. 158 of the Merchant Shipping Act, 1894, and that the word "loss" ought to bear a meaning somewhat similar to that of the word "wreck," and for the purpose of

(1) 4 C. Rob. 143.

(2) [1915] 1 K. B. 922.

showing the meaning of the word "wreck" in the section reliance was placed upon a passage in the judgment of Buckley L.J. in the case of *The Olympic* (1): "The wreck of the ship in this context, I think, is anything happening to the ship which renders her incapable of carrying out the maritime adventure in respect of which the seaman's contract was entered into." It was urged that by the detention of the ship for nearly twelve months there was a loss of the adventure. But in this passage Buckley L.J. is obviously referring to something physical happening to the ship, which injures and damages her, so as to make the ship unseaworthy for so long a time as to make a continuance of her voyage useless as a commercial adventure. In my judgment there has not been any loss of the ship within s. 158 of the Merchant Shipping Act, 1894.

Nor was the contract with the seaman at an end and dissolved by law, on the ground that the further prosecution of the venture could not proceed without trading with the enemy. If the ship were released it would be the duty of the seaman to assist in bringing her home. And it is manifest that the occurrence of a state of war, whereby the further prosecution of a voyage becomes illegal, cannot at once determine the contract of the seaman. In many, probably most of, such cases the vessels engaged in the voyage would at the outbreak of war be on the high seas, where the services of the mariners could not possibly be dispensed with. The mere detention of the ship without its confiscation does not in my opinion ipso facto determine the engagement of the mariners.

For these reasons I am of opinion that it has not been shown that the plaintiff's husband has ceased to be entitled to the wages out of which the allotment is to be paid, and that the judgment of Rowlatt J. was right, and that this appeal should be dismissed.

PHILLIMORE L.J. read the following judgment:—The plaintiff is the wife of a seaman who was serving as second mate on board the *Coralie Horlock*, and she is the holder of an allotment note covering half his wages. The defendant is the shipowner. The

(1) [1913] P. at p. 107.

C. A. 1915

BEAL v. HORLOCK.

Phillimore L.J.

facts have been agreed between the parties. We are told that it is a test case and a friendly action.

On May 21, 1914, the husband signed articles for a voyage not exceeding two years from Hull to Alexandria and other ports within certain limits, trading in rotation, and to end at such port in the United Kingdom or on the Continent within home trade limits as might be required by the master. The vessel sailed from Hull, went to Alexandria and thence to other ports, arriving at Hamburg on August 2. On August 4 war broke out between Great Britain and Germany. What followed is thus stated in paragraphs 8 and 9 of the agreed statement of facts: "(8.) The said vessel was then and still is in the port of Hamburg and is unable to leave the said port by reason of detention by the German authorities. The defendant has been since the 4th August, 1914, and still is deprived of the possession of the said vessel, and the said Tom Rea Beal with the officers and other members of the crew was on or about November 2nd removed from the said vessel to a lodging ship in Hamburg and on or about the 8th November was interned at Ruhleben near Berlin. (9.) The defendant has paid to the plaintiff under the said allotment note 4*l.* 15*s.* on the 23rd June, 4*l.* 15*s.* on the 22nd July, and 1*l.* 13*s.* 8*d.* on the 2nd August, 1914, and no more."

The husband's wages and the plaintiff's allotment were both payable monthly. The plaintiff has been paid up to August 2, and the defendant contends that he is not liable to pay wages to the husband or any allotment to the plaintiff after August 4.

The plaintiff as an allottee has the same rights as her husband; she has even certain advantages in the matter of proof if her claim is disputed. Under s. 143 of the Merchant Shipping Act, 1894, she is to recover "unless the seaman is shown, in manner in this Act specified, to have forfeited or ceased to be entitled to the wages out of which the allotment is to be paid . . . . and the seaman shall be presumed to be duly earning his wages, unless the contrary is shown to the satisfaction of the Court . . . ." On the other hand, the section goes on to provide certain modes of proof available to the shipowner. Sect. 144, which provides for the times of payment, has been repealed by the Merchant

Shipping Act, 1906, and a new provision was made by s. 62 of that Act; but the alterations are not, I think, material.

We have, therefore, to inquire whether the plaintiff's husband has forfeited or ceased to be entitled to his wages. It is contended on behalf of the plaintiff that if special cases provided for in ss. 159, 160, and 161 are put aside—and they have no application to this case—the only instances in which a seaman forfeits or ceases to get his wages are those provided in s. 158: "Where the service of a seaman terminates before the date contemplated in the agreement, by reason of the wreck or loss of the ship, or of his being left on shore at any place abroad under a certificate granted as provided by this Act of his unfitness or inability to proceed on the voyage, he shall be entitled to wages up to the time of such termination, but not for any longer period." It is, I think, clear that this section is not exhaustive. Rowlatt J. in his judgment points out several cases in which a seaman would cease to get his wages, and which are not covered by this section. It may be a section only dealing with the case of ceasing to be entitled, but, even so, some of Rowlatt J.'s instances would show it not to be exhaustive.

As to forfeiture, it has been held by the Court of Appeal in a case which I cannot find reported, but which I remember arguing, that the common law power of dismissal for insubordination—such dismissal working a forfeiture—was not excluded by the earlier Act of 1862, and it is known that the Act of 1894 was intended to be a codification Act only.

But I am not sure that these observations carry the case for the shipowner much further. If indeed the word "loss" meant some form of physical destruction, so that the word "wreck" would be confined to the case where the ship struck ground, and the word "loss" applied to foundering, burning, or crushing by ice, then it would be necessary to invoke the doctrine that the section was not exhaustive. For loss to the owner by reason of capture and condemnation by a Power at war with Great Britain would certainly cause the seaman to cease to be entitled, as was stated by Kennedy L.J. in *The Olympic* (1) on his own authority and that of Dr. Lushington

(1) [1913] P. at p. 117.

C. A. 1915

BEAL v. HORLOCK.

Phillimore L.J.

in *The Florence*. (1) I may add that several cases, English and American, are cited in Pritchard's Admiralty Digest, 3rd ed., pp. 2158 and 2305, to the same effect. I should be prepared to hold that seizure by pirates was a loss either within s. 158, or by the common law, as indeed Dr. Lushington thought.

This leaves us to determine whether this ship has been so lost, or to such an extent lost, to her owners that the seaman has ceased to be entitled to his wages either on August 4 or, if it be of importance to consider it, at some later period.

In *The Olympic* (2), to which I have referred, the majority of the Court construing the word "wreck" gave it an extended meaning. They looked at the consequences to the shipowner, and held that the vessel had, by reason of her injuries, ceased to be seaworthy for so long a time "as to make the continuance of the voyage useless as a commercial venture": per Vaughan Williams L.J. (at p. 103); or that she ceased to be "a ship of service for the purposes of the adventure": per Buckley L.J. (at p. 106). It may be that in considering the word "loss" we ought to import similar considerations. What has happened to this ship? The agreed statement is that she is unable to leave port by reason of detention by the German authorities, and that the shipowner has been deprived of his possession of her. Rowlatt J. has taken it that she was detained in accordance with the provisions of the Hague Convention No. VI. of 1907.

The material clauses of this Convention relative to the status of enemy merchant ships at the outbreak of hostilities are as follows: Art. 1: "When a merchant-ship belonging to one of the belligerent Powers is at the commencement of hostilities in an enemy port, it is desirable that it should be allowed to depart freely, either immediately, or after a reasonable number of days of grace, and to proceed, after being furnished with a pass, direct to its port of destination or any other port indicated to it . . . ." Art. 2: "A merchant-ship which, owing to circumstances beyond its control, may have been unable to leave the enemy port within the period contemplated in the preceding article, or which was not allowed to leave, may not be

(1) (1852) 16 Jur. 572, at p. 573. (2) [1913] P. 92.

confiscated. The belligerent may merely detain it, on condition of restoring it after the war, without payment of compensation, or he may requisition it on condition of paying compensation." If it is to be taken that it is not a detention within art. 2 of the Hague Convention just set forth, then it is an extremely hostile act, because it is contrary to what is expressed to be desirable by art. 1, and to the international practice which before the Hague Convention had been established for at least fifty years: see Pearce Higgins on The Hague Peace Conferences, pp. 300—304. If it is to be taken, as Rowlatt J. has held, that the detention was under art. 2 of the Convention, it opens a wholly new question.

It has been suggested in argument that this detention might be likened to an embargo which, according to the decided cases, if afterwards removed so that the voyage is ultimately accomplished, does not work a forfeiture of wages and indeed further entitles the seaman, if paid by time, to his monthly wages during the period of the embargo even if he is taken away from the ship and imprisoned: see *Pratt* v. *Cuff* (1); *Delamainer* v. *Winteringham* (2); and the most authoritative case of all, *Beale* v. *Thompson* (3), affirmed in the House of Lords. (4) But the embargo cases are not, I think, in point.

First, as it was observed by Sir William Scott in *The Boedes Lust* (5), and by Sir Robert Phillimore in *The Teutonia* (6) and in his Commentaries on International Law, vol. 3, pt. 9, c. 3, an embargo is distinct from an act of war. It is, to use Sir William Scott's language, an equivocal act, and if the two nations come to terms without going to war, the ships and crews are restored, and it is treated, as he says, as a mere civil embargo; whereas, if the end of the controversy is war, the original seizure for embargo purposes may be turned into a capture and result in condemnation.

Secondly, during the operation of the old law that freight was the mother of wages, which prevailed till the general Merchant Seamen's Act (7 & 8 Vict. c. 112, s. 17) made the first

(1) Cited 4 East, at p. 43.
(2) 4 Camp. 186.
(3) 4 East, 546.
(4) 1 Dow, 299.
(5) 5 C. Rob. at p. 246.
(6) L. R. 3 A. & E. at pp. 412, 413.

C. A. 1915

BEAL v. HORLOCK.

Phillimore L.J.

inroad on the old law, and till the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), s. 183, finally abrogated it, no action for wages could be begun till the voyage was finished, and therefore the point never arose except in cases where the embargo had been raised, the ship restored and brought back, and the claimant restored to her, so that he contributed to finishing the voyage. That this last condition is a necessary one is shown by the case of *The Friends*. (1) The only difficulty the Courts had in these circumstances was to determine whether the seaman should get his pay during the period of embargo and imprisonment.

There have been cases where vessels were seized before the declaration of war, and where ultimately on the conclusion of peace there was mutual restoration. This would be much more like the present case, but I am not aware that there are any decisions as to seamen's claims in such cases. In the present case there is a seizure operating after war has been declared, "war the end of which cannot be foreseen": per Willes J., delivering the judgment of the Exchequer Chamber in *Esposito* v. *Bowden*. (2) This phrase is repeated by Sir Robert Phillimore in *The Teutonia*. (3) In *Geipel* v. *Smith* (4) Lush J. expresses himself as follows: "If the impediment had been in its nature temporary I should have thought the plea bad; but a state of war must be presumed to be likely to continue so long, and so to disturb the commerce of merchants, as to defeat and destroy the object of a commercial adventure like this."

During the argument I thought that some light might be thrown upon the meaning of the Hague Convention by the decisions of our own Prize Court on German vessels in a similar position in this country. There is a reported case of *The Chile* (5), where the form of the sentence of the Court is set out. There is an important distinction between this form of sentence and the form where the ship is condemned as prize out and out and ordered to be sold. I have obtained a copy of the sentence in the following case of *The Marie Glaeser* (6), and there

(1) 4 C. Rob. 143.
(2) 7 E. & B. at p. 792.
(3) L. R. 3 A. & E. at p. 412.
(4) L. R. 7 Q. B. at p. 414.
(5) [1914] P. 212.
(6) [1914] P. 218.

is a great difference. In fact, the Prize Court Rules, 1914, provide for two different forms of sentence, Appendix A., Form 53 (i.) and (ii.).

This argument, it must be admitted, makes, so far, in favour of the seaman.

The sentence of the Prize Court, however, puts the ship at the disposition of the Crown. As we know, and as the article of the Hague Convention provides, ships so sentenced are subject to requisition and have been taken. Anyhow, they are detained till " after the war."

The consequences of holding that the seaman's engagement remains are very serious. If the war which is approaching the end of its first year were to last many years, which God forbid, the shipowner might be ruined by the payment of pensions for many years, and the payment of the accumulated balance at the end. A contrary conclusion is hard upon the allottees, but we may reasonably hope that some provision may be made for them out of public funds.

On the whole, I think that this detention, whether it is to be taken as being under the Hague Convention or otherwise, is of the nature of a hostile capture, and not only puts an end to the voyage but further creates a loss of the ship, and, if it is necessary so to decide, a loss under s. 158. I am fortified in this conclusion by the way in which the majority of the Court in the case of *The Olympic* (1) dealt with the parallel word " wreck."

An argument for the respondent was based upon s. 134. This supposes that the engagement has come to an end, and that the seaman has not been paid. Whether an allottee of wages could claim a portion of the " sharp penalty " provided by this section may be doubtful. It is enough to say that the non-payment of wages, if it has occurred, has not been " the wrongful act or default of the owner or master."

I think that the appeal should succeed.

BANKES L.J. read the following judgment :—This is the defendant's appeal from a judgment of Rowlatt J.

The plaintiff is a person in whose favour an allotment note

(1) [1913] P. 92.

C. A. 1915

BEAL v. HORLOCK.

Bankes L.J.

was given by the master or owner of the steamship *Coralie Horlock* at the instance of the plaintiff's husband, who was engaged as second mate on that vessel. The vessel was unfortunately in the port of Hamburg at the time of the declaration of war with Germany. All the information given to the Court as to what has since happened to the vessel and her crew is that contained in an agreed statement of facts, in which it is stated (paragraph 8) that the vessel is unable to leave the port "by reason of detention by the German authorities," and that "the defendant has been since the 4th August, 1914, and still is deprived of the possession of the said vessel," and further that the plaintiff's husband "with the officers and other members of the crew was on or about November 2nd removed from the said vessel to a lodging ship in Hamburg, and on or about the 8th November was interned at Ruhleben near Berlin." Upon this state of facts the defendant contends that he is under no obligation to pay to the plaintiff any moneys under the allotment note after August 4, 1914, upon the ground that he was not liable to pay the plaintiff's husband any wages after that date.

The position of a person in whose favour an allotment note has been made is a statutory one. Sect. 143 of the Merchant Shipping Act, 1894, provides that such a person may, unless the seaman is shown, in manner in this Act specified, to have forfeited or ceased to be entitled to the wages out of which the allotment is to be paid, recover the sums allotted when and as the same are made payable. The section further provides that in any proceeding for such recovery on proof of certain facts (which facts are admitted in the present case) the seaman shall be presumed to be duly earning his wages unless the contrary is shown to the satisfaction of the Court in certain ways set out in detail in the sub-paragraphs to the section. The defendant rests his case entirely on sub-paragraph (*d*), which provides for the case where satisfactory proof is given that the seaman has ceased to be entitled to the wages out of which the allotment is to be paid. If this can be made out it affords an answer to this action. In my opinion the evidence before the Court is wholly insufficient to establish it. Long periods of detention of a vessel under orders of embargo, even when accompanied by imprisonment of her

crew, have been held insufficient to deprive a seaman of his right to payment of his wages for the full period of detention where the voyage is ultimately resumed and completed: see *Beale* v. *Thompson* (1); *Hadley* v. *Clarke*. (2) In *Beale* v. *Thompson* (1) and similar cases the question did not arise until after the voyage had been resumed, and in that respect they differ from the present case. They establish the principle, however, that mere detention is not sufficient to deprive a seaman of his wages where the voyage has ultimately been resumed and completed, and it seems to follow that in a case of mere detention it is no answer to a claim for wages to say that it seems uncertain whether the voyage will be resumed.

In the present case the plaintiff issued her writ in the month of April last, and the learned judge has directed payment of the amount of the allotment note up to the date of the issue of the writ. The circumstances which it is material to consider, therefore, are the circumstances existing at that date. The agreed statement of facts affords the very minimum of information. It does not even state whether the vessel is detained under the terms of the Hague Convention. The case was argued on the footing that she was so detained, and, if she was, I agree with that part of the judgment of Rowlatt J. in which he says that he is not at liberty to conjecture that the Convention is torn up or thrown to the winds, and that consequently he must come to the conclusion that the vessel is merely detained, and is not confiscated or requisitioned at present. I am prepared to go further in the same direction as the learned judge and to say that we are not at liberty to conjecture on any of the points on which the defendant relies. It is said on the defendant's behalf that the vessel has been lost, and that the adventure has come to an end in a commercial sense, and that on one or other of these grounds the plaintiff's husband has ceased to be entitled to his wages. The mere fact that the vessel is detained owing to a state of war, and that the crew are interned in Germany, is not, in my opinion, sufficient proof that either event had occurred at the date of the writ, or indeed has yet occurred. There is at present, in my opinion, no evidence before the Court which would justify a

(1) 4 East, 546. (2) 8 T. R. 259.

C. A. 1915

BEAL v. HORLOCK.

Bankes L.J.

conclusion in the defendant's favour. It may eventually turn out that he is in the right in his contention, but he cannot, in my opinion, establish it on the present evidence. The result is that, under these circumstances, the seaman must, under the provision of the statute, be presumed to be duly earning his wages.

Mr. Greer has contended that unless and until the defendant can satisfy the Court that the engagement of the plaintiff's husband has either terminated under s. 158 of the Merchant Shipping Act, 1894, or that he has been discharged in the manner indicated by s. 127 and the following sections, the amount payable under the allotment note must continue to be paid. In the view I take of the evidence in this case it is not necessary to express any opinion on these points. I agree that the appeal should be dismissed with costs.

Appeal dismissed.

Solicitors for plaintiff: *Griffiths & Roberts, for Miller, Taylor & Holmes, Liverpool.*

Solicitors for defendant: *Holman, Birdwood & Co.*

W. F. B.

[IN THE KING'S BENCH DIVISION AND IN THE COURT OF APPEAL.]

K. B. D. 1915 *June* 25; *July* 7.

C. A. *July* 14, 15, 23.

In the Matter of a PETITION OF RIGHT.

War—Crown—Prerogative—Defence of the Realm—Naval and Military Authorities—Right to take Possession of Land and Buildings without Compensation—Defence of the Realm Act, 1842 (5 & 6 *Vict. c.* 94)—*Defence of the Realm* (*Consolidation*) *Act*, 1914 (5 *Geo.* 5, *c.* 8), *and Regulations thereunder.*

The Crown represented by the competent naval and military authorities has power in time of war, both by virtue of the Royal prerogative and also under the Defence of the Realm (Consolidation) Act, 1914, and the Regulations thereunder, to take possession of and occupy any lands or premises for the purposes of the defence of the realm without making compensation therefor to the owner.

The prerogative right is not limited to a case of actual invasion rendering immediate action necessary.

Decision of Avory J. affirmed.

Petition of Right tried before Avory J. without a jury.

On December 24, 1914, the military authorities took and entered into possession of certain land and buildings belonging to and occupied by the suppliants for the purposes of an aviation ground or aerodrome, and continued to retain possession thereof. The learned judge found as a fact, upon the evidence and admissions, that the possession and occupation of the land and premises in question was, in the opinion of the competent naval or military authority, necessary for securing the public safety and the defence of the realm, and that such possession and occupation was not intended to be of a permanent character, but only for such time as might be required by the exigencies of the present war.

The suppliants claimed a declaration that they were lawfully entitled, under the Defence of the Realm Act, 1842, or under the Military Lands Act, 1892, or other Acts amending the same, to proper compensation for and in respect of their land and premises so taken and held.

The Attorney-General, on behalf of the Crown, replied that possession of the lands and remises was taken by virtue of

C. A. 1915

A PETITION OF RIGHT, *In re.*

His Majesty's Royal prerogative and by virtue of the powers of the Defence of the Realm (Consolidation) Act, 1914 (1), and of the Regulations (2) issued thereunder on November 28, 1914; and he denied that compensation was by law payable to the suppliants under the Act of 1842 or the Act of 1892 or any Act amending the same, or at all.

Leslie Scott, K.C., and *Frank Gover*, for the suppliants.
Sir F. E. Smith, S.-G., and *Stuart Bevan*, for the Crown.

Cur. adv. vult.

July 7. AVORY J. (3) The question for decision in this case is whether in time of war between His Majesty and foreign powers the competent naval or military authority acting on behalf of His Majesty is entitled to take possession of and occupy lands and premises, the possession and occupation of which is in their opinion necessary for securing the public safety and the defence of the realm, without making compensation to the owners or persons claiming to be entitled to the possession of such land and premises, in other words, whether the suppliants in the circumstances of this case are by law entitled to compensation either under the Defence of the Realm Act, 1842, or the Military Lands Act, 1892, or any Act amending the same or either of them, or otherwise.

I find as a fact, upon the evidence and admissions made, that

(1) 5 Geo. 5, c. 8, s. 1:

"(1.) His Majesty in Council has power during the continuance of the present war to issue regulations for securing the public safety and the defence of the realm . . . .

"(2.) Any such regulations may provide for the suspension of any restrictions on the acquisition or user of land or the exercise of the power of making byelaws or any other power under the Defence Acts, 1842 to 1875, or the Military Lands Acts, 1891 to 1903 . . . ."

(2) Defence of the Realm (Consolidation) Regulations, 1914 (issued on November 28, 1914), No. 2: "It shall be lawful for the competent naval or military authority and any person duly authorised by him, where for the purpose of securing the public safety or defence of the realm it is necessary so to do—

"(*a*) to take possession of any land . . . .

"(*b*) to take possession of any buildings or other property . . . ."

(3) The judgment was written.

the possession and occupation of the land and premises in question was in the opinion of the competent naval or military authority necessary for securing the public safety and the defence of the realm, and that such possession and occupation is not intended to be of a permanent character, but only for such time as is required by the exigencies of the existing war.

The suppliants in this petition, while not disputing the right of the naval or military authorities acting on behalf of His Majesty the King compulsorily to possess and occupy the said lands and premises, contend that such right is subject to their right to compensation under the Defence of the Realm Act, 1842, the Military Lands Act, 1892, or other Acts amending the same. The Solicitor-General in answer contends that His Majesty in time of war is by virtue of his Royal prerogative entitled to possess and occupy any lands or premises for purposes of the defence of the realm without making compensation therefor, and that if such prerogative right is open to doubt the competent naval or military authority acting on behalf of His Majesty was entitled so to do by virtue of the powers of the Defence of the Realm Act, 1914, and the Regulations issued thereunder by His Majesty in Council. In reply Mr. Leslie Scott on behalf of the suppliants contends that the prerogative right claimed only exists in time of actual invasion by an enemy, and that the Defence of the Realm Act, 1914, and the Regulations issued thereunder do not repeal or suspend the right to compensation conferred by the earlier Acts.

If it had been necessary to decide this case on the Royal prerogative alone, I would have devoted more attention to it. A reference to the case of *Rex* v. *Hampden* (1) (the Ship Money Case) will show the amount of learning and argument that may be bestowed upon it; but as the point has been raised I will express my opinion upon it. The case just mentioned and other authorities appear to establish that by the Constitution the defence of the realm is entrusted to the Crown, that the law has entrusted the person of His Majesty with the care of this defence, that in this business of defence the "suprema potestas" is inherent in His Majesty as part of his Crown and kingly dignity,

(1) (1637) 3 Howell's State Trials, 825.

1915

A PETITION OF RIGHT, *In re.*

Avory J.

that in times of war or invasion the maxim "Salus populi suprema lex" must prevail, and that in these times of war not only His Majesty, but likewise every man that hath power in his hands, may take the goods of any within the realm, pull down their houses or burn their corn to cut off victuals from the enemy, and do all other things that conduce to the safety of the kingdom without respect had to any man's property. These propositions are admitted by Mr. St. John in his exhaustive argument against the Crown in that case, and Sir Richard Hutton, one of the judges who gave judgment against the Crown, said (1): "There are some inseparable prerogatives belonging to the Crown, such as the Parliament cannot sever from it. . . . . Such is the care for the defence of the kingdom, which belongeth inseparably to the Crown as head and supreme protector of the kingdom"; and further he said (2): "I do agree in the time of war, when there is an enemy in the field, the King may take goods from the subject [where there is] such a danger as tends to the overthrow of the kingdom." In the *Saltpetre Case* (3), quoted by the Solicitor-General, (a decision of all the judges) it is said: "When enemies come against the realm to the sea-coast, it is lawful to come upon my land adjoining to the same coast, to make trenches or bulwarks for the defence of the realm, for every subject hath benefit by it. And therefore by the common law, every man may come upon my land for the defence of the realm"; and, coming to later times, to quote a dictum of Willes J. in *Hole* v. *Barlow* (4), "Every man has a right to the enjoyment of his land; but, in the event of a foreign invasion, the Queen may take the land for the purpose of setting up defences thereon for the general good of the nation. In these and such like cases private convenience must yield to public necessity." In support of his argument that this prerogative can lawfully only be exercised in the event of actual invasion, Mr. Leslie Scott relies upon the words in the *Saltpetre Case* (3), "When enemies come against the realm to the sea-coast," and upon

(1) 3 Howell's State Trials, at p. 1194.

(2) Ibid. at p. 1198.

(3) (1606) 12 Rep. 12.

(4) (1858) 4 C. B. (N.S.) 334, 345.

the words "or unless the enemy shall have actually invaded the United Kingdom at the time when such lands . . . . shall be so taken" in s. 23 of the Act 5 & 6 Vict. c. 94. If this be a limitation on the exercise of the prerogative, I think the changed conditions of modern warfare must be taken into account, and the realm now requires protection from enemy aircraft and the long-range guns of enemy ships as in the old days it required protection from the landing of enemy troops. Moreover, when possession was taken of the lands and premises in question there had been an actual bombardment of the coast by ships of the enemy. Without pretending to an exhaustive study of the question I have come to the conclusion that His Majesty, by virtue of his war prerogative, through his representatives, was under the then existing circumstances entitled to take possession of the land and premises in question and still is entitled to occupy the same without making compensation to the suppliants.

If the case, however, be considered as governed by statute law alone, I should come to the same conclusion. With the exception of the expression to which attention has been called in s. 23 of the Defence of the Realm Act, 1842, it appears to me that this Act and the Military Lands Act, 1892, and the Acts amending the same prior to the Defence of the Realm Act, 1914, are intended to operate in times of peace and not in times of war, and the possession and occupation of lands and premises therein contemplated are of a permanent or quasi-permanent character. I think the expression in s. 23, "or unless the enemy shall have actually invaded the United Kingdom," must be intended as a saving of His Majesty's prerogative right in time of war. Otherwise, upon the suppliants' argument, there would have been no power compulsorily to take possession of the land, as it is not suggested that the other conditions precedent in the section had been fulfilled; and it has been laid down that Acts of Parliament which would divest the King of his prerogatives or abridge them in the slightest degree do not in general extend to or bind the King unless there be express words to that effect: see Chitty's Prerogatives of the Crown, p. 383; Bacon's Abridgment, tit. Prerogative E., 5. But if I am wrong in this view of the operation of

1915

A PETITION OF RIGHT, *In re.*

Avory J.

the Acts of 1842 and 1892, the effect of the Defence of the Realm Act, 1914, and the Regulations issued thereunder has still to be considered. In my opinion regulation No. 2 of these Regulations confers upon the competent naval or military authority during the continuance of the present war an absolute and unconditional power to take possession of land or buildings and to do any other act involving interference with private property, where for the purpose of securing the public safety or the defence of the realm it is necessary so to do, and that this enactment impliedly repeals for the time being any right to, or liability to pay, compensation if it existed in time of war under the earlier Acts. It was argued that, as the Act of 1914 empowered also the making of regulations providing for the suspension of any restrictions on the acquisition or user of land under the Defence Acts or Military Lands Acts, it was necessary for the Crown to show a specific suspension in the Regulations of the right to compensation. I think the absolute and unconditional power conferred by regulation No. 2 is sufficient to suspend, if not to repeal, all restrictions, including any restriction from taking possession of land without paying compensation.

Upon these grounds I come to the conclusion that the suppliants have failed to establish any right in law to compensation under the circumstances of this case, and judgment must be entered for the Crown.

I think it right to add that the suppliants are, in my opinion, entitled to apply to the Commissioners under the Royal Commission of Inquiry, dated March 31, 1915, for compensation in respect of any direct and substantial loss incurred and damage sustained by them by reason of interference with their property or business in the circumstances of this case.

Judgment for the Crown.

J. H. W.

The suppliants appealed.

July 14. *Leslie Scott, K.C.*, and *Frank Gover*, for the appellants. The claim of the Crown is put on two grounds: (1.) the general prerogative right of the Crown to take lands

for the defence of the realm, and (2.) the right given to the Crown by the Regulations made under the Defence of the Realm (Consolidation) Act, 1914. The first ground is based upon the *Saltpetre Case* (1), which decided that the Crown had a right to dig saltpetre on any man's land when necessary for the defence of the realm, and that the Crown or any other person may enter upon lands to construct bulwarks for the defence of the realm. The right to take saltpetre is described as a "purveyance." Purveyances were abolished in 1660 by the statute 12 Car. 2, c. 4. The right to enter upon land was only admitted in cases of urgent military necessity, of which the example given is invasion by an enemy.

As to the statutory right, the Regulations under the Act of George V. make no mention of compensation. But that Act comes within the rule laid down by Lord Esher in *Attorney-General* v. *Horner* (2), that "It is a proper rule of construction not to construe an Act of Parliament as interfering with or injuring persons' rights without compensation, unless one is obliged to so construe it." In 1803 and 1804, when an invasion of England by Napoleon was expected, two Acts for the defence of the realm were passed (43 Geo. 3, c. 55, and 44 Geo. 3, c. 95) which gave the Crown power to take lands for the defence of the realm, on making compensation. Those Acts have been since repealed, but they are referred to to meet the argument, now urged, that the Crown always had a prerogative power to take lands for the defence of the realm without paying compensation, except as of grace. If it were so, there would have been no need to pass Acts giving the Crown power to take lands with compensation. The Defence of the Realm Act, 1842 (5 & 6 Vict. c. 94), and the Military Lands Act, 1892 (55 & 56 Vict. c. 43), which consolidate the powers of the Crown to take lands, recognize the legal right of the persons whose lands are taken to compensation to be fixed by the Courts in the ordinary way. The suppliants claim a declaration that they have a legal right to compensation.

This petition was presented before the appointment of the Royal Commission of March 21, 1915, but that Commission would only give compensation as a matter of grace, not of right,

(1) 12 Rep. 12. (2) (1884) 14 Q. B. D. 245.

C. A. 1915

A PETITION OF RIGHT, *In re.*

and the Commissioners are only to inquire what compensation ought to be paid to persons in respect of "direct and substantial loss incurred and damage sustained by reason of interference with their property and business." The compensation under the former Defence of the Realm Acts, which was to be ascertained according to the Lands Clauses Consolidation Act, was much wider. The power given to the King in Council by the Defence of the Realm (Consolidation) Act, 1914 (5 Geo. 5, c. 8), to make regulations "for the suspension of any restrictions on the acquisition or user of land" only refers to restrictions as to delay or notice. The right of the owner to compensation cannot be treated as a restriction under this section.

The prerogative claimed can only be exercised in time of war, but this is not time of war, for "the Courts of justice are open . . . . and may by law protect men from violence and wrong": Co. Litt. 249b; Broom's Constitutional Law, 2nd ed., p. 329.

It is said prerogative cannot be affected by a statute in which the King is not named, but that is too wide; where a direct right is given by statute to a subject it cannot be taken away by prerogative: Chitty's Prerogative of the Crown, ch. 15, p. 383.

No prerogative rights can be claimed which are not defined by statute or immemorial user; and there cannot be a prerogative right to take away a subject's property without compensation: Blackstone's Commentaries, Kerr's ed., 1876, bk. i., ch. 1, p. 109; Turnor's Case of the Bankers, 3rd ed., pp. 10, 43; Allen on the Royal Prerogative, p. 158, ed. 1849; Broom's Constitutional Law, 2nd ed., p. 225.

Sir F. E. Smith, S.-G., and *Branson*, for the Crown. All the cases and all the text-book writers state that, before and apart from the statutes referred to by the suppliants, the Crown had a right to enter upon any lands where necessary for the defence of the realm, and there is no suggestion that there was any right to compensation for land so taken. *Governor and Company of the British Cast Plate Manufacturers* v. *Meredith* (1) is a clear

(1) (1792) 4 T. R. 794.

authority that if a public official having authority by Act of Parliament to do anything for the public good do damage to an individual's property, that individual has no right to compensation, except what is expressly given by the Act; and Buller J. in his judgment gives the case of a man's house being pulled down for the defence of the realm as an instance of cases in which a man must suffer for the common good.

The Act of 1842 and the later Acts relied on deal with what can be done in times of peace and are chiefly concerned with the taking of a man's land permanently. In that case no doubt he is entitled to compensation. The executive power of the Crown usually spoken of as the Royal prerogative has always extended to doing anything which in the judgment of the King and his officers was necessary for the defence of the realm.

It is said that the prerogative is limited to cases of actual invasion rendering immediate action necessary. But it is submitted that when this property was taken the enemy had by bombardment and by aircraft attack actually invaded this country. It is for the military and naval authorities to decide when an emergency has arisen. The Court has no information upon the question, and is therefore not in a position to overrule the military and naval authorities even if it were proper for it to do so. There has never been any successful claim for compensation against the Crown in such a case.

The taking away the right of the owner to compensation is the suspension of a "restriction on the acquisition or user of land" within the meaning of s. 1, sub-s. 2, of the Defence of the Realm (Consolidation) Act, 1914. Regulation 7, which gives power to requisition the output of factories manufacturing arms, ammunition, &c., provides for compensation, whereas no such provision is made by regulation 2.

[*Leslie Scott, K.C.* Sect. 1, sub-s. 3 (*a*), of the Act of 1914 gives the Admiralty or Army Council power to require that the output of a munition factory shall be placed at their disposal. That cannot be without compensation.]

No; but (*b*) gives power to take possession of and use the factory for the purpose of the naval or military service, which would not necessarily involve compensation. The Legislature

C. A. 1915

A PETITION OF RIGHT, *In re.*

has left the case of factories or workshops to the ordinary regulations, but has made provision for compensation under regulation 7 where arms or munitions are taken. Regulation 8 gives no right to compensation.

The Defence Act of 1842, s. 23, had no reference to the taking of land under circumstances calling for an exercise of the prerogative. In all cases of emergency or necessity there is an inherent right in the Crown to take possession of the subject's property for the purposes of defence of the realm without making compensation. The prerogative is not affected by the statutes.

Leslie Scott, K.C., in reply.

At the conclusion of the arguments LORD COZENS-HARDY M.R. said that in the opinion of the Court the appeal failed, but having regard to the importance of the case their reasons would be given on a future occasion.

Cur. adv. vult.

July 23. LORD COZENS-HARDY M.R. This petition of right is based upon the view that the Crown, represented by the naval and military authorities, has no right to take possession of the plaintiffs' land and buildings without paying compensation, even though, in the opinion of those authorities, it is necessary for securing the public safety and the defence of the realm that possession should be taken. The land in question has been used for the purpose of manufacturing and storing aeroplanes and other articles of that nature. Its situation is very desirable for those purposes. The Court will take judicial notice that this country is in a state of war, that its coasts have been attacked by Zeppelins and other aircraft, and, further, that certain places on the east coast have been subjected to attack by the enemy's fleet. In these circumstances the naval and military authorities have to a very great extent exercised the rights they now claim. They assert that by Royal prerogative in time of war, and for the security of the realm, the King is authorized to take possession of land, and, further, that everything which has been done is justified by the Defence of the Realm (Consolidation) Act, 1914,

C A.
1915

A PETITION OF RIGHT, *In re.*

Lord Cozens-Hardy M.R.

and the Regulations made thereunder. The evidence of Captain Clive Miller, which was not in any way challenged by cross-examination, was that the occupation of the suppliants' aerodrome was necessary for securing the public safety and the defence of the realm.

The prerogative is part of the common law of this country. In the case of *The King's Prerogative in Saltpetre* (1), in discussing what the King may or may not do, the judges laid down that "when enemies come against the realm to the sea-coast, it is lawful to come upon my land adjoining to the same coast, to make trenches or bulwarks for the defence of the realm, for every subject hath benefit by it. And therefore by the common law, every man may come upon my land for the defence of the realm, as appears 8 Edward IV. 23." This passage has often been referred to as conclusively laying down the law, and I do not think it necessary to cite other authority. The existence of the prerogative was not distinctly challenged by counsel for the suppliants, but they sought to limit it to a case of actual invasion rendering immediate action necessary. In my opinion there is no foundation for this limitation of the prerogative. To postpone action until the enemy has landed, or until the authorities are satisfied that a landing in a particular neighbourhood is imminent, would, or might, be fatal to the security of the realm. The statute 43 Geo. 3, c. 55, passed in 1803, is a plain assertion of the prerogative right. The recital is as follows: "Whereas it is expedient that His Majesty should be enabled to exercise in the most effectual manner the powers by law vested in him for preventing and repelling an invasion of the United Kingdom of Great Britain and Ireland by His Majesty's enemies and that for such purpose provision should be made to enforce prompt obedience to such orders as His Majesty, or the Lord Lieutenant or other chief governor or governors of Ireland for the time being, shall think fit." If it be said that the prerogative right cannot extend to an aerodrome because aeroplanes were not known in the reign of Richard I., I think the answer is to be found in the somewhat analogous case of *Mercer* v. *Denne* (2), where this Court held that a customary right to "cutch" fishing nets

(1) 12 Rep. 12.

(2) [1905] 2 Ch. 538, 585.

C. A. 1915

A PETITION OF RIGHT, *In re.*

Lord Cozens-Hardy M.R.

was not limited to materials known in the reign of Richard I., but extended to drying nets with suitable materials. So the prerogative applies to what is reasonably necessary for preventing and repelling invasion at the present time, regard being had to the invention of gunpowder and the use of aeroplanes in warfare. But then it is said that the Act of 1842 (5 & 6 Vict. c. 94) deals with a case like the present, but only upon terms of paying compensation. In my opinion this argument cannot prevail. In the first place, the Act of 1842 is one of general application, applying when the State is at peace as well as when it is at war. In the second place, it authorized the compulsory purchase of land for public purposes or for the defence of the realm, a matter quite beyond the prerogative right. In the third place, no step can be taken under that Act without giving fourteen days' notice. In the fourth place, the prerogative right cannot be interfered with or taken away except by plain language or necessary implication. I think the Act of 1842 in no way affects the prerogative right.

This being in my opinion the state of the common law, I approach the consideration of the recent Act of Parliament and the Regulations made thereunder. The Act confers powers "during the continuance of the present war to issue regulations for securing the public safety and the defence of the realm." It expressly mentions in s. 1 certain acts altogether outside any prerogative right, and in sub-s. 2 it says "Any such regulations may provide for the suspension of any restrictions on the acquisition or user of land or the exercise of the power of making byelaws or any other power under the Defence Acts, 1842—1875." When I turn to the Regulations, s. 2 expressly authorizes the competent naval or military authority where, for the purpose of securing the public safety or the defence of the realm, it is necessary so to do, inter alia, "(*a*) to take possession of any land and construct military works thereon; (*b*) to take possession of any buildings or other property . . . . (*f*) to do any other act involving interference with private rights of property which is necessary for the purpose aforesaid." There is no provision for compensation in respect of any act done in exercise of these powers, although there is mention of compensation in

s. 7, which deals with a different subject-matter. In my opinion the language of the statute, and of the Regulations made thereunder, plainly justified what the Crown has done. If, contrary to my view, the Act of 1842 would have enabled the Crown to take possession on payment of compensation, I think the words in s. 1, sub-s. 2, of the Act authorize the suspension of any "restrictions" on the acquisition of land, one of which is the expiration of fourteen days, and another of which is the necessity of paying compensation.

For these reasons, which are substantially those stated by Avory J., I think the appeal fails and must be dismissed.

To avoid misconception I desire to add that the Crown has expressed its willingness to pay to the suppliants the sums which "in reason and fairness" ought to be paid out of public funds to the suppliants, the amount of such sums being referred to what has been called Mr. Duke's Commission. This, however, does not affect the legal question which comes up for our decision.

PICKFORD L.J. The suppliants in this case are the owners of a flying ground, or aerodrome, and before the outbreak of war the Crown had some tenancy rights in the premises for which an agreed sum was paid. At the expiration of those rights the Crown took possession of the land. The Crown was always willing to pay compensation, though the legal liability to do so was denied, but unfortunately the parties could not agree as to the amount to be paid, or to the tribunal to which the difference should be submitted, and this petition of right was filed by the suppliants for the purpose of establishing their legal right to compensation. Whether such a right exists or not is the only question before us, but I do not think it is correct to say, as the suppliants suggested in correspondence, and as their counsel said in argument, that there was an intention on the part of the Crown to put upon individuals a burden which should be borne by the nation as a whole. The Crown was always willing, whether there was a legal right or not, that compensation should be paid.

The sole question before us is whether the suppliants have a legal right to compensation. It is claimed in the petition under

C. A. 1915

A PETITION OF RIGHT, *In re.*

Pickford L.J.

the Defence Act, 1842, or the Military Lands Act, 1892, but the claim is really under the former Act, and the Acts amending it. I do not think the suppliants have this right. In my opinion the question is settled by the Defence of the Realm Act, 1914, and the Regulations made under it. That Act provides in sub-s. 1 that "His Majesty in Council has power during the continuance of the present war to issue regulations as to the powers and duties of the Admiralty and the Army Council, and of the members of His Majesty's Forces, and other persons acting in his behalf," and in sub-s. 2, "and may by such regulations also provide for the suspension of any restrictions on the acquisition or user of land, or the exercise of the power of making byelaws, or any other powers under the Defence Acts, 1842 to 1875, or the Military Lands Acts, 1891 to 1903."

I think that, as Avory J. said, regulation 2 confers upon the competent naval or military authority during the continuance of the present war an absolute and unconditional power to take possession of land or buildings and to do any other act involving interference with private property where for the purpose of securing the public safety or the defence of the realm it is necessary to do so, and therefore it empowers them to do so without compensation.

Regulations are to be made, and regulation 2 is to this effect: "It shall be lawful for the competent naval or military authority and any person duly authorised by him, where for the purpose of securing the public safety or the defence of the realm it is necessary to do so—(*a*) to take possession of any land and to construct military works, including roads, thereon, and to remove any trees, hedges, and fences therefrom," and then, after a number of other provisions, "(*f*) to do any other act involving interference with private rights of property which is necessary for the purpose aforesaid." The argument against this interpretation is, as I understand it, that this Act so far as the taking of land goes deals with the same subject-matter as the Defence Act of 1842, that it is ancillary or complementary to it and cannot take away the right to compensation there given, as such right is not included in the word "restrictions." It is therefore contended that any regulation made under the Act of 1914, if on its

C. A.
1915
A PETITION OF RIGHT, *In re.*
Pickford L.J.

true construction it takes away such right, is ultra vires. I cannot agree with this view of the Act of 1914. I think it is dealing with the taking of land from a different point of view from the Act of 1842. The Act is, if I may call it so, a permanent Act giving the Crown power to take land temporarily or permanently, whether in time of war or time of peace, upon certain conditions; for example, it requires certain certificates before land can be taken against the will of the owner, and also requires a notice to treat and a warrant of justices before the Crown can take possession, and gives a right of compensation to be assessed by a jury. The power is only given to certain highly placed officials of the Crown.

The Act of 1914 deals with an absolutely different state of things. It is legislation only during the continuance of the war, for the emergency of war, when it is necessary that the powers of the Crown should be exercised more freely and expeditiously than in time of peace, and sub-s. 1 in my opinion gives the widest possible power of making regulations for the safety and defence of the realm and as to the powers and duties of the Admiralty and Army Council and of the members of His Majesty's Forces and other persons acting in his behalf. I can see no reason for limiting such power to regulations which shall not interfere with any rights given under any former Acts, and I agree with Avory J. that such a regulation may give powers wider than and inconsistent with the rights conferred by the Act of 1842. The power given by regulation 2 is not confined to the highly placed officials mentioned in the Act of 1842, or any one who may have been substituted for them by later Acts, but gives it to a much wider class of competent authorities defined by regulation 62; it is in these terms: "The Admiralty or Army Council may appoint any commissioned officer of His Majesty's naval or military forces, not below the rank of lieutenant-commander in the Navy, or field officer in the Army, to be a competent naval or military authority, and may authorise any competent naval or military authority thus appointed to delegate, either unconditionally or subject to such conditions as he thinks fit, all or any of his powers under these Regulations to any officer qualified to be appointed a competent naval or

C. A. 1915

A PETITION OF RIGHT, *In re.*

Pickford L.J.

military authority, and an officer so appointed, or to whom the powers of the competent naval or military authority are so delegated, is in these Regulations referred to as a competent naval or military authority." That regulation does not in terms provide for the suspension of the restrictions on the acquisition or user of land under the Defence Acts, 1842 to 1875, as provided by sub-s. 2, and I do not know whether it was intended to be made under that sub-section or not. I think it could be quite validly made under sub-s. 1, and that the power of modifying or superseding the powers of earlier Acts is not confined to the suspension of restrictions mentioned in sub-s. 2.

It is not in the view I take necessary to decide whether taking away the right to compensation is within the words suspending restrictions, but I am inclined to think it is. It is not disputed that the obligation to obtain certain certificates before taking land against the owner's will is a restriction that could be so suspended, and I cannot see why the restriction against taking it without compensation should not be on the same footing.

It was also argued before us that apart from legislation the Crown had the same power by virtue of the prerogative. In the view I take it is not necessary to decide this point, but I do not wish to be taken to express any opinion against that contention. It is admitted that there may be emergencies in which the Crown may exercise its prerogative in that way, but there is a difference as to the nature of the emergency which will justify it.

I do not wish to say more than that I think some of the arguments on the part of the suppliants seemed to give too little weight to the change in the implements of war and the method of making war at the present day as compared with those existing at the time of some of the authorities which were cited to us.

I think the appeal should be dismissed.

WARRINGTON L.J. The suppliants in this petition of right are the owners of certain lands and buildings used by them for the practice of aviation. In December last year it became in the opinion of the military advisers of the Crown necessary for securing the public safety and the defence of the realm that

possession of such lands and premises should be taken by the competent military authority on behalf of His Majesty, and possession was so taken accordingly.

The suppliants contend that by virtue of the Defence Act, 1842, and other Acts of a similar nature they are legally entitled to compensation to be ascertained as provided for by those Acts, and this being refused, they have presented the present petition with the object of establishing their supposed right. His Majesty claims no right or interest in the lands except the right to take and use the lands for so long and in such manner as may be necessary for securing the public safety and the defence of the realm during the present war. This right is claimed by virtue of the Royal prerogative and the Defence of the Realm (Consolidation) Act, 1914, and the Regulations issued thereunder by the King in Council on November 28, 1914. The exercise of these rights gives no legal claim to compensation, but the authorities of the Crown are willing to pay ex gratia such sum as may be awarded by the Royal Commissioners appointed for the purpose of assessing compensation in such and the like cases.

It cannot, I think, be disputed, and the suppliants do not in fact dispute, that the King, as the supreme executive authority, was and is now by virtue of the prerogative entitled in certain circumstances of national emergency to take and use the property of a subject or otherwise interfere with private rights in order to provide for the safety of the public and the defence of the realm. Reference to this matter is found in the case of *The King's Prerogative in Saltpetre*. (1) The reference is in these terms: "But when enemies come against the realm to the sea-coast, it is lawful to come upon my land adjoining to the same coast, to make trenches or bulwarks for the defence of the realm, for every subject hath benefit by it. And therefore by the common law, every man may come upon my land for the defence of the realm, as appears 8 Edward IV. 23. And in such case on such extremity they may dig for gravel, for the making of bulwarks; for this is for the public, and every one hath benefit by it; but after the danger is over, the trenches and bulwarks ought to be removed, so that the owner shall not have prejudice in his

(1) 12 Rep. 12.

C. A. 1915

A PETITION OF RIGHT, *In re.*

Warrington L.J.

inheritance: and for the commonwealth, a man shall suffer damage; as, for saving of a city or town, a house shall be plucked down if the next be on fire: and the suburbs of a city in time of war for the common safety shall be plucked down; and a thing for the commonwealth every man may do without being liable to an action, as it is said in 3 Henry VIII., folio 15. And in this case the rule is true, Princeps et respublica ex justa causa possunt rem meam auferre."

But it is said that the right is confined to the doing of what is necessary for the conduct of actual military operations against an enemy on the soil of this country. I cannot think that this can be so. So to limit the prerogative would in these days be to render it practically useless for the purpose for which it is entrusted to the King. The circumstances under which the power may be exercised and the particular acts which may be done in the exercise thereof must of necessity vary with the times and the advance of military science, and those circumstances and acts which are mentioned in the passage I have read from Coke's Reports must I think be taken as examples or illustrations of a much wider class of circumstances and acts. The only condition which it would appear must be fulfilled is that the act in question, having regard to existing circumstances, must be necessary for the public safety and the defence of the realm, and on this matter the opinion of the competent authorities who alone have sufficient knowledge of the facts, provided they act reasonably and in good faith, should be accepted as conclusive.

In the present case, having regard to the attacks which have been actually made upon our shores, it cannot, I think, be denied that the authorities might reasonably come to the conclusion to which they have in fact arrived, that it was necessary to take and use the land in question. There is no suggestion of want of good faith. I think, therefore, that what has been done would be justified as an exercise of the prerogative, and in such case it is admitted that no claim to compensation arises.

But whether this is correct or not, the action of the military authorities is in my opinion amply justified by the Defence of the Realm (Consolidation) Act, 1914, and the Regulations made thereunder. The material parts of the Act are contained in

C. A.
1915

A PETITION OF RIGHT, *In re.*

Warrington L.J.

sub-ss. 1 and 2 of s. 1 and are as follows: "His Majesty in Council has power during the continuance of the present war to issue regulations for securing the public safety and the defence of the realm, and as to the powers and duties for that purpose of the Admiralty and Army Council and of the members of His Majesty's Forces and other persons acting in his behalf." Then sub-s. 2: "Any such regulations may provide for the suspension of any restrictions on the acquisition or user of land, or the exercise of the power of making byelaws, or any other power under the Defence Acts, 1842 to 1875." The Regulations were contained in an Order in Council dated November 28, 1914. The material parts are as follows: "It shall be lawful for the competent naval or military authority and any person duly authorised by him, where for the purpose of securing the public safety or the defence of the realm it is necessary so to do—(*a*) to take possession of any land and to construct military works, including roads, thereon, and to remove any trees, hedges, and fences therefrom; (*b*) to take possession of any buildings or other property, including works for the supply of gas, electricity, or water, and of any sources of water supply." Then "(*f*) to do any other act involving interference with private rights of property which is necessary for the purpose aforesaid." The expression "competent naval or military authority" is defined by regulation 62.

If there were any doubt as to the extent of the prerogative, this Act and the Regulations completely dispose of it, and confer powers which are in my opinion unquestionably sufficient to enable the authorities to do what they have done in the present case. The Act gave power to suspend any restrictions on the acquisition and user of land under the Defence Act of 1842. The Regulations by giving the unlimited power mentioned above without providing compensation have, in my opinion, suspended all restrictions, including the liability of the military authorities to make compensation. But it is said that the Defence Act of 1842 gave to the subject a right to compensation in respect of the taking by the officers of the Crown of land for military purposes, that this is a right the neglect of which cannot be necessary for the public safety. I think the answer to that contention is that

C. A. 1915

A PETITION OF RIGHT, *In re.*

Warrington L.J.

the Act in question had no reference to the taking and using of land under circumstances justifying an exercise of the prerogative, but dealt only with the taking of land by way of purchase or lease, and only in that case conferred the right to compensation. But even if I am wrong in this view and but for the Act of 1914 there would be a legal claim to compensation by virtue of the Act of 1842, any such right is effectually suspended by the Act of 1914 and the Regulations made thereunder.

On the whole, in my opinion the appeal fails and must be dismissed.

Appeal dismissed.

Solicitors for appellants: *Wingfield, Blew & Kenward.*
Solicitor for the Crown: *Treasury Solicitor.*

G. A. S.

1915
July 5, 6.

F. A. TAMPLIN STEAMSHIP COMPANY *v.* ANGLO-MEXICAN PETROLEUM PRODUCTS COMPANY.

Shipping — Charterparty — Implied Condition — Tank Steamship — Time Charterparty—Employment for Carriage of Oil as Charterers should direct—Liberty to sub-let on Admiralty or other Service—Requisition of Steamship by Admiralty—Employment for Transport of Troops—Effect of Requisition—Whether Charterparty put an end to or suspended.

By a time charterparty a tank steamship was chartered to be employed in such lawful trades for voyages between any safe ports within certain limits for the carriage of oil as the charterers or their agents should direct. The charterparty contained an exception (inter alia) of "arrests and restraints of princes" and the charterers had the liberty of sub-letting the steamer on Admiralty or other service. During the currency of the charterparty the steamer was requisitioned by the Admiralty and after necessary alterations was employed by them in the transport of troops:—

Held, that there was no implied condition in the charterparty that the steamer should remain fit for the carriage of oil, and that the requisition by the Admiralty of the steamer did not put an end to or suspend the charterparty.

AWARD made by an arbitrator in the form of a special case.

By a time charterparty dated May 18, 1912, made between the F. A. Tamplin Steamship Company, Limited, as owners and S.

Pearson & Son, Limited, of London, as charterers, the British tank steamship *F. A. Tamplin*, then building, was chartered. It was agreed before the arbitrator that the Anglo-Mexican Petroleum Products Company, Limited, were to be treated as the charterers notwithstanding that the name of S. Pearson & Son, Limited, appeared in the charterparty.

The steamship was placed at the charterers' disposal on or about December 4, 1912, and the charterparty period of sixty months would end on December 4, 1917. Under the charterparty the steamship was "to be employed in such lawful trades for voyages between any safe port or ports in the United Kingdom and/or Continent of Europe and/or any safe port or ports in the United States of America and/or Mexico and/or North and South America and/or Africa and/or Asia and/or Australasia and back finally to a coal port in the United Kingdom for the carriage of refined petroleum and/or crude oil and/or its products, but warranted no B. N. A. on Atlantic except for coaling; warranted no Baltic between October 1 and April 1, warranted no White Sea between October 1 and April 1, as charterer or his agents shall direct, on the following" (inter alia) "conditions:—

"1. That the owners shall provide and pay for all the provisions and wages of the captain, officers, engineers, firemen, and crew. Shall pay for the insurance of the vessel, also for all stores (excluding fresh boiler water, which is to be paid for by charterers) and maintain her in a thoroughly efficient state in hull, machinery and equipment for and during the service; but owners not to be responsible for leakage of oils from any cause but they are to make good any defects in compartments as soon as practicable on receiving notice thereof." "3. That the charterers shall pay for the use and hire of the said vessel at the rate of 1750*l.* sterling per calendar month," which was at the expiration of the first twelve calendar months to be reduced to 1700*l.* a month. "20. The act of God, perils of the sea, fire, barratry of the master and crew, enemies, pirates and thieves, arrests and restraints of princes, rulers and people, collisions, stranding and other accidents of navigation always excepted, even when occasioned by negligence, default or error in judgment of the pilot, master, mariners, or other servants of the shipowner."

1915

F. A. TAMPLIN STEAMSHIP COMPANY v. ANGLO-MEXICAN PETROLEUM PRODUCTS COMPANY.

"22. No goods contraband of war to be shipped, and the steamer not to be required to enter any port that is in a state of blockade or where hostilities are in progress. In the event of a country to which steamer trades being at war with any other country, charterers agree to insure (for owners' benefit) the steamer against all war risks . . . ." "25. No voyage to be undertaken or goods or cargoes loaded that would involve risk of seizure, capture or penalty by British or foreign rulers or Government; and no acids or injurious cargoes to the steamer to be shipped." "26. Charterers to have the option of shipping in all tanks and in 'tween decks and/or any other suitable space available, such quantity of turpentine or naphtha in cans, cases and/or barrels and/or drums or other suitable cargo, but quantity to be at the master's discretion . . . ." 28 was the arbitration clause. "34. Charterers to have the liberty of subletting the steamer on Admiralty or other service without prejudice to this charter-party, but the charterers remaining responsible."

Shortly before February 10, 1915, notice was given to the Anglo-Mexican Petroleum Products Company, Limited, by the Director of Transports that the *F. A. Tamplin* was requisitioned "from the time she arrives has discharged and is ready." The steamer arrived at Cardiff on February 10, and as soon as she was ready she proceeded under orders given under the requisition to Liverpool, where she arrived on February 15. Immediately after her arrival at Liverpool many structural alterations were made and she was fitted for the transport of troops. These alterations were made by the British Government contractors by direction of the British transport officers and she was thereafter used for the carriage of troops.

The dispute between the parties was with regard to their position and rights under the charterparty in respect of the period subsequent to the arrival of the steamship at Liverpool on February 15, 1915. The main contentions on behalf of the owners were that the requisitioning of the *F. A. Tamplin* by the British Government in February, 1915, made it impossible for the owners to continue to give the charterers the use of the steamship under the charterparty, and that the charterparty was then put an end to or at all events suspended by matters within

the exception of restraint of princes. They also contended that this requisition was not and could not be treated as a sub-letting by the charterers inasmuch as the charterers were not entitled to sub-let on the terms of the requisition and in particular were not entitled to sub-let so as to permit structural alterations of the steamer or the use of her for the carriage of troops, and they contended that the requisitioning was not in fact a sub-letting.

The main contentions on behalf of the charterers were that the requisitioning of the *F. A. Tamplin* by the British Government in February, 1915, did not put an end to or suspend the charterparty, and that the requisition was or should be treated as a sub-letting by the charterers who under the charterparty had the right to the use of the steamer and to sub-let her on Admiralty or other service. They also contended that any structural alterations made by the British Government or any use by them of the steamer for purposes other than the carriage of refined petroleum and/or crude oil and/or its products and any use by the Government under the requisition were not breaches of contract by the charterers and did not entitle the owners to treat the charterparty as at an end. They contended that these matters were within the exception of restraint of princes and that the charterers were not responsible. The charterers also contended that as they were willing to accept the terms on which the Government requisitioned the steamer, this was in fact a sub-letting by them.

Subject to the opinion of the Court the arbitrator awarded (inter alia) that the charterparty came to an end on February 15, 1915.

The question for the Court was whether on the facts stated in the special case the arbitrator was right in holding that the charterparty came to an end when the steamer was requisitioned by the British Government in February, 1915, and if he was wrong in so holding, then whether the requisition suspended the charterparty during the period of the requisition or affected in any way the rights of the owners or charterers under the charterparty.

F. D. Mackinnon, K.C., and *R. A. Wright*, for the charterers. The charterparty was not affected by the ship being requisitioned

1915

F. A. TAMPLIN STEAMSHIP COMPANY v. ANGLO-MEXICAN PETROLEUM PRODUCTS COMPANY.

by the Government. The charterers were at liberty, under clause 34 of the charterparty, to sub-let to the Admiralty, and the requisition amounted to a sub-letting. The exception "restraint of princes" is for the protection of the shipowners. But by contending that the charterparty is at an end they are trying to convert the exception into a weapon of offence against the charterers. That they have no right in law to do. The charterers are entitled to pay the charterparty hire to the shipowners and to receive the hire paid by the Government. The charterers do not assert that there has been any breach of contract by the shipowners. The requisition was an exercise of overpowering force by the State, and neither party could prevent it.

G. Wallace, K.C., and *W. N. Raeburn*, for the shipowners. It was an implied condition of the charterparty that the ship should remain fit for carrying oil, and when she ceased to be fit for that purpose the contract ipso facto determined. The ship was not let for general purposes. The charterers only hired her for the purpose of carrying crude or refined oil and for no other purpose. The contract was to let the ship as an oil tanker, and if she became unfit for that purpose the contract determined: *Nickoll* v. *Ashton* (1); *Krell* v. *Henry*. (2) After the alterations by the Admiralty she ceased to be a tank steamer. If the ship is let for a particular purpose, and the Crown intervenes and by virtue of its prerogative says, in effect, "You shall not use it for anything of the sort," the contract is terminated by the exercise of the Royal prerogative. The whole basis of the contract is gone, although it is true that the charterers have not repudiated the contract in the sense of having done a voluntary act. Unless it is clear that the arbitrator is wrong in law his award ought to be upheld.

Mackinnon, K.C., in reply. The provision that the ship is to be fit to carry oil is for the protection of the charterers. They are entitled to waive the benefit of the provision if they think fit. The shipowners are attempting to insist in the name of the charterers that the charterparty shall be put an end to. The shipowners have no right in law to assert that the charterers must make that claim. The provision would only be material

(1) [1901] 2 K. B. 126. (2) [1903] 2 K. B. 740.

if the charterers were asserting that the shipowners had committed a breach of the charterparty. [*Brown* v. *Turner*, *Brightman & Co.* (1) was referred to.]

ATKIN J., having stated the facts, continued: No question arises before me as to the complete power of the Admiralty to require the use of the vessel to be given up to them. The dispute between the parties appears to have arisen some time after February, 1915, in consequence of the owners claiming that the contract was suspended during the time that the vessel was requisitioned by the Admiralty and that they were the persons who were entitled to deal with the Admiralty in respect of her, and to have, therefore, the rate of freight which the Admiralty were paying. That contention was not accepted by the charterers, and in that way the dispute originally seems to have come before the arbitrator. The learned arbitrator, who has dealt with the case as a pure question of law, has awarded that the charterparty came to an end on February 15, 1915, and the question as he states it is whether he is right in so awarding or not. I have great respect for the opinion of the arbitrator. He is a very well known legal gentleman whose opinion is entitled to the very greatest weight on questions of this kind, but I do not agree with his opinion. There is no doubt that there was a contract in existence for five years, and if the shipowners wish to put an end to it, or to successfully contend that it is at an end, they must show some legal principle upon which it is put an end to. It was not argued before me that there has been any breach of contract by the charterers. I do not think it could be so contended. In my judgment the requisitioning by the Admiralty is an act which is altogether independent of the charterers, and, further, even if it were an act of the charterers or anything which could be said to be a breach of contract by them, I think there is very little doubt that they would be protected by the exceptions if those exceptions were available in their favour. Indeed Mr. Wallace, on behalf of the shipowners, did not contend before me that there was any breach of contract by the charterers. There has therefore been no

(1) [1912] A. C. 12.

1915

F. A. TAMPLIN STEAMSHIP COMPANY v. ANGLO-MEXICAN PETROLEUM PRODUCTS COMPANY.

Atkin J.

breach going to the root of the contract which would entitle the shipowners to put an end to it.

In those circumstances what ground is there for saying that the contract is put an end to? Mr. Wallace contended that an implied condition in the contract had not been fulfilled and that the contract was therefore at an end. He relied upon the principle which has been laid down in various authorities and was formulated by Vaughan Williams L.J. in *Krell* v. *Henry* (1) in language which, although perhaps somewhat vague, I think, in the terms in which it is couched, expresses the principle of law. He said: "I think that you first have to ascertain, not necessarily from the terms of the contract, but, if required, from necessary inferences, drawn from surrounding circumstances recognized by both contracting parties, what is the substance of the contract, and then to ask the question whether that substantial contract needs for its foundation the assumption of the existence of a particular state of things. If it does, this will limit the operation of the general words, and in such case, if the contract became impossible of performance by reason of the non-existence of the state of things assumed by both contracting parties as the foundation of the contract, there will be no breach of the contract thus limited." On behalf of the shipowners Mr. Wallace contended that it is an implied term of this charterparty that the ship shall always continue to be fit to carry oil, and that if she does not continue to be fit to carry oil—that being a state of things the assumption of which is the foundation of this contract—the contract is thereupon at an end. It is a little difficult to conceive that state of things as being necessarily that which both the parties were contemplating. It is not, and I do not think it could be, suggested that if in fact the ship became unfit to carry oil by reason of the default of either of the parties the contract would be at an end. Either the charterers might be in default in not exercising reasonable care, or the shipowners might be responsible and have to make good the default if the charterers were not to blame for it, and in those circumstances the condition of things would be due to the default of either one or other of the parties.

(1) [1903] 2 K. B. 740, at p. 749.

Therefore the contention on behalf of the shipowners is necessarily limited to the suggestion that it is only when the ship continues to be unfit for the carriage of oil without the default of either of the parties that the contract is to be deemed to be brought to an end.

Now I see no reason for assuming that as a necessary condition of this contract. What the charterers have to do is to pay the freight. They are not obliged to use the ship for the carriage of oil. Under the charterparty if the carriage of oil became unremunerative they could (using reasonable care to preserve the ship so as to be able to hand her over in reasonable condition at the time when the charterparty comes to an end) lay the ship up, and, moreover, they have the power under it of carrying other cargo than oil subject to the conditions which are mentioned in the charterparty. Their main obligation, as far as the owners are concerned, is to pay the freight, and I see, therefore, no ground for suggesting that there is a condition of the contract that when the ship ceases, without the default of either party, to be fit for the carriage of oil the contract is to be treated as at an end. If that is not a condition of the contract, and there is no breach by either party, I am quite unable to see upon what ground the contract can be said to be at an end. What has happened is that the charterers having the use for five years of that which is of value to the Government, the Government have taken away that from them and are appropriating it for national purposes. During that time—the Government having the right to do it—there is no breach of contract by the charterers, and it appears to me that there is nothing in respect of which the shipowners are entitled to complain. There is no breach of contract—certainly nothing which entitles them to say to the Admiralty "Pay to us the money for the use of the ship of which you have, in fact, deprived the charterers." As I am unable to see any legal ground upon which this contract has come to an end, and inasmuch as it appears to me that the contentions which were put before the arbitrator have not been argued before me, and inasmuch as the contention which was argued before me was not, in fact, argued before the arbitrator, I am unable to answer the question except

1915

F. A. TAMPLIN STEAMSHIP COMPANY v. ANGLO-MEXICAN PETROLEUM PRODUCTS COMPANY.

to say that in my opinion the arbitrator was not right in holding that the charterparty came to an end, or was suspended. Therefore the question ought to be answered to the effect that the charterparty has not been either put an end to or suspended. The costs are left to me, and I think that the charterers should have the costs of the reference and of the award and the costs before me.

Question answered in negative.

Solicitors for owners: *Holman, Birdwood & Co.*
Solicitors for charterers: *Thomas Cooper & Co.*

J. E. A.

1915
July 22, 23.

In re AN ARBITRATION BETWEEN SHIPTON, ANDERSON & CO. AND HARRISON BROTHERS & CO.

Contract—Impossibility of Performance—Implied Condition—Sale of Specific Goods—Goods requisitioned by the Crown before Delivery and before Property passed to Purchaser—Seller excused from Performance of the Contract.

By a contract in writing, made in September, 1914, the owner of a specific parcel of wheat in a warehouse in Liverpool sold it upon the terms "payment cash within seven days against transfer order." Before delivery and before the property passed to the buyer the wheat was requisitioned by and delivered to His Majesty's Government under the powers of an Act passed before the date of the contract:—

Held, that, delivery of the wheat by the seller to the buyer having been rendered impossible by the lawful requisition of the Government, the seller was excused from performance of the contract.

CASE stated by arbitrators for the opinion of the Court, under s. 19 of the Arbitration Act, 1889.

On September 2, 1914, Shipton, Anderson & Co. by a contract in writing sold to Harrison Brothers & Co., on the terms of the Rules of the Liverpool Corn Trade Association, "about 42,800 centals winter wheat ex *Dalecrest* ex grain storage; payment cash within seven days against transfer order." The sellers were then the owners of wheat of that quantity and description discharged from the *Dalecrest* and lying at a warehouse in Liverpool. The wheat was then subject to a lien for freight and charges and not standing in the names of the sellers in the books of the

warehousemen. On September 4, the lien having been satisfied, the wheat was transferred into the names of the sellers and they obtained a delivery order. On the same day the sellers were verbally informed that the wheat was requisitioned by His Majesty's Government. On September 8 the sellers received a written requisition requiring them to deliver the wheat to the agent of His Majesty's Government, and at once informed the buyers. On September 11 the agent for His Majesty's Government applied to the sellers for delivery of the wheat and obtained from them a delivery order therefor. No delivery order or transfer order was at any time given by the sellers to the buyers under the contract of sale.

The buyers claimed damages from the sellers for non-delivery of the wheat. The matter was referred to arbitration pursuant to the Rules of the Liverpool Corn Trade Association, and an award was made that the sellers were not relieved from their responsibility to the buyers under the contract. The sellers appealed to the appeal committee of the association, and contended that the property in the wheat had passed to the buyers before it was requisitioned, and that they were excused from carrying out the contract by reason of the wheat having been requisitioned.

The questions stated for the opinion of the Court were: (1.) When did the property in the wheat pass to the buyers under the contract? (2.) Were the sellers, owing to the action of the British Government, excused from carrying out their contract?

W. N. Raeburn, for the sellers. The effect of the requisition of the wheat by the Government was to render performance of the contract by the sellers to deliver impossible, and the sellers were thereby released from their obligation to deliver.

[He was stopped by the Court.]

R. A. Wright, for the buyers. This is a contract for the sale of specific goods and is absolute in its terms. The sellers, therefore, must show some legal ground upon which they are excused from performance; vis major or inevitable necessity is not sufficient, for they might have provided against it by their

1915

SHIPTON, ANDERSON & CO. AND HARRISON BROTHERS & CO.'S ARBITRATION, *In re.*

contract: *Jacobs* v. *Crédit Lyonnais.* (1) In *Tamplin Steamship Co.* v. *Anglo-American, &c., Co.* (2) it was held that the requisitioning of a ship by the Government did not affect the contract contained in the charterparty. This contract is unconditional, and the Court ought not to imply any term that the sellers shall not be bound to deliver the goods if they are requisitioned. The Sale of Goods Act, 1893, by s. 7 provides that where specific goods perish after a contract of sale without any fault of either party and before the risk has passed to the seller the contract is avoided; but the statute does not excuse the seller for any other cause, and the express mention of this one cause excludes any other implied cause: *Howell* v. *Coupland.* (3) This is not a case where the intervention of a statute has made performance of a contract impossible, as in *Baily* v. *De Crespigny* (4), or where the law has been altered and the contract cannot be performed without a violation of English law, as in *Esposito* v. *Bowden.* (5) It is a question of fact to be determined in each particular case upon the terms of the contract and all the circumstances whether the parties contracted upon the basis of the continuance of a certain state of facts as the foundation of the contract and whether there is an implied condition that if that state of facts ceases to exist, or upon the happening of a certain event, the contract is to be avoided: *Taylor* v. *Caldwell* (6); *Krell* v. *Henry* (7); *Ashmore* v. *Cox* (8); *Nickoll* v. *Ashton.* (9) In the present case the contract was made some time after the commencement of the war, and the parties must be assumed to have known that the wheat might be requisitioned by the Government; with that knowledge the sellers entered into this absolute contract when they might have expressly provided that they should be relieved from liability in such an event; and therefore a condition relieving them in such an event ought not to be implied: *Paradine* v. *Jane.* (10)

The property in the goods had not passed to the purchasers.

(1) (1884) 12 Q. B. D. 589, at p. 603.
(2) Ante, p. 668.
(3) (1876) 1 Q. B. D. 258.
(4) (1869) L. R. 4 Q. B. 180.
(5) (1857) 7 E. & B. 763.
(6) (1863) 3 B. & S. 826.
(7) [1903] 2 K. B. 740.
(8) [1899] 1 Q. B. 436.
(9) [1901] 2 K. B. 126.
(10) (1646) Aleyn, 26.

The sellers did "reserve the right of disposal of the goods" until certain conditions were fulfilled, within s. 19 of the Sale of Goods Act, 1893. "Payment cash within seven days against transfer order" was a condition by which the sellers reserved the right of disposal until it was fulfilled: *Bishop* v. *Shillito* (1); *Godts* v. *Rose*. (2) [*The Moorcock* (3) and *Hamlyn* v. *Wood* (4) were referred to.]

Raeburn in reply. The property in the goods had passed to the purchasers. This case is not within s. 19 of the Sale of Goods Act. There was an unconditional contract for the sale of specific goods, and there was merely a postponement of the time of payment and delivery; the case therefore comes within r. 1 of s. 18 of the Sale of Goods Act and the property passed when the contract was made.

Under the Army (Supply of Food, Forage, and Stores Act), 1914, which came into force on August 7, the Government had power to requisition this wheat. It is an implied term of every English contract that performance is excused if performance subsequently becomes illegal by common law or by statute: *Esposito* v. *Bowden* (5); *Millar* v. *Taylor*. (6) A lawful act of the Government which makes performance illegal makes it impossible and excuses performance in every case. It would have been illegal for the sellers to deliver this wheat to the buyers after the requisition. It must be an implied term of this contract that the parcel of wheat shall continue to be one which the sellers can lawfully deliver: *Nickoll* v. *Ashton*. (7)

LORD READING C.J. Shipton, Anderson & Co., a firm carrying on business at Liverpool, sold a parcel of wheat ex *Dalecrest* to Harrison Brothers & Co., also a firm carrying on business at Liverpool. The contract was made on September 2, 1914, after the war had commenced, and was for a parcel of "about 42,800 centals winter wheat ex *Dalecrest*, ex grain storage; payment in cash within seven days against transfer order." At the date of the contract the sellers were the owners of this parcel of

(1) (1818) 2 B. & Ald. 329, n.
(2) (1855) 25 L. J. (C.P.) 61.
(3) (1889) 14 P. D. 64.
(4) [1891] 2 Q. B. 488.
(5) 7 E. & B. 763.
(6) [1915] W. N. 116.
(7) [1901] 2 K. B. 126, 132.

1915

SHIPTON, ANDERSON & CO. AND HARRISON BROTHERS & CO.'S ARBITRATION, *In re.*

Lord Reading C.J.

wheat which was then lying at the warehouse after having been discharged from the *Dalecrest*. The discharge was originally subject to the lien for freight which at all material times had been satisfied. On September 4 the sellers were informed that this wheat was requisitioned by His Majesty's Government, and on September 8 formal notification in writing requisitioning the wheat was delivered to them. The sale was a sale of specific goods which were then lying at the warehouse. In consequence of the requisition of the Government the sellers were unable to deliver the wheat; and the buyers put forward a claim for damages which, by virtue of the Rules of the Liverpool Corn Trade Association, was referred to arbitration.

The arbitrators have referred to this Court two questions. The first is whether the property in the wheat sold passed to the buyers under the contract. Upon that point the question turns on whether the contract was a sale which comes within s. 18 of the Sale of Goods Act, 1893, or whether it comes within s. 19 of that Act. If the contract was an unconditional contract for the sale of specific goods in a deliverable state, then, by virtue of r. 1 of s. 18, the property in the goods passed to the buyers when the contract was made, and it would be immaterial whether the terms of payment, or the time of delivery, or both, were postponed. By s. 19, where the contract is for the sale of specific goods the seller may, by the terms of the contract, reserve the right of disposal of the goods until certain conditions are fulfilled, in which case the property in the goods does not pass until those conditions are fulfilled. The question in this case depends upon whether or not the right of disposal of the goods had been reserved by the sellers under the terms of the contract until payment had been made. It appears to me that under this contract the sellers did reserve such a right of disposal by making it a term of the contract that cash was to be paid within seven days against transfer order; that the intention of the parties was that they should have this right of disposal until payment had been made; and that, consequently, the property had not passed to the buyers. Therefore the answer to the first question is, in my judgment, that the property in the goods sold had not passed to the buyers under the contract.

Having come to that conclusion it becomes necessary to determine the second question, which is whether the sellers were excused from performance of the contract owing to the action of the Government in requisitioning the wheat. A question of law of considerable importance is raised because it is contended on the one hand by the buyers that this is an absolute contract, and that, consequently, if the sellers are unable to perform their contract by delivering the wheat, they are not excused by reason of the Government's requisition; and it is urged by the buyers that notwithstanding that this is a sale of specific goods, and that those goods had passed altogether out of the dominion of the sellers by virtue of the Government's requisition, nevertheless they were liable in damages to the buyers for failure to deliver the goods. It is conceded by the sellers that this in one sense no doubt is an absolute contract, for no act or default of the sellers could excuse them from the performance of the contract; but it is urged that where, as in this case, the performance of the contract had been rendered impossible, not by reason of any act or default of the sellers, but by the lawful act of the Executive, that is an excuse from the performance, because the contract must be taken as having been made subject to a possibility of requisition by the Government, and if so the sellers could not perform the contract and would be asked to do that which it was an impossibility for them to do. No doubt there are cases on either side of the line, and the application of the principles of law is a matter of some nicety and difficulty, but I have come to the conclusion that in this case the sellers are excused from the performance of the contract, and that the contract must be taken as an undertaking by the sellers to deliver the goods subject always to this condition, that if the Government requisition the goods and render it impossible by their act for the sellers to perform their contract they should be excused from performance. That conconclusion is, I think, supported both by *Nickoll* v. *Ashton* (1) and the decision in *Baily* v. *De Crespigny*. (2) The particular passage in *Nickoll* v. *Ashton* (3) upon which reliance has been placed on behalf of the sellers is that in which the Court in

(1) [1901] 2 K. B. 126. (2) L. R. 4 Q. B. 180.
(3) [1901] 2 K. B. at p. 132.

1915

SHIPTON, ANDERSON & CO. AND HARRISON BROTHERS & CO.'S ARBITRATION, *In re.*

Lord Reading C.J.

dealing with the principle of such cases as *Taylor* v. *Caldwell* (1) and *Howell* v. *Coupland* (2) cited the rule stated in *Taylor* v. *Caldwell* (1) to this effect: "Where from the nature of the contract it appears that the parties must from the beginning have known that it could not be fulfilled unless, when the time for the fulfilment of the contract arrived, some particular specified thing continued to exist, so that, when entering into the contract, they must have contemplated such continuing existence as the foundation of what was to be done, there, in the absence of any express or implied warranty that the thing shall exist, the contract is not to be construed as a positive contract, but as subject to an implied condition that the parties shall be excused in case before breach performance becomes impossible from the perishing of the thing without default of the contractor." It is to be observed that in that rule stress is laid upon the perishing before breach of the thing which was the foundation of the contract. The principle of the case seems to me equally applicable to that now under consideration, where by reason of the lawful act of the Executive the thing, in a sense, has perished. Certainly it is no longer in the power of the sellers to perform their contract. In my judgment, in the words of A. L. Smith M.R. in *Nickoll* v. *Ashton* (3), "The true construction of the contract is that it is not a positive and absolute contract as contended for by the plaintiffs, but is a contract subject to the condition that the parties shall be excused if, before breach, performance becomes impossible by reason of the particular specified thing ceasing to exist without the defendants' default." In the case of *Baily* v. *De Crespigny* (4) the principles of law were considered by the Court of Queen's Bench consisting of Cockburn C.J. and Lush, Hannen, and Hayes JJ., and in the judgment of the Court, delivered by Hannen J., it is said, after reference to certain cases, "It is on this principle that it has been held that an impossibility, arising from an act of the Legislature subsequent to the contract, discharges the contractor from liability . . . . This is the principle of that which was laid

(1) 3 B. & S. 826.
(2) 1 Q. B. D. 258.
(3) [1901] 2 K. B. 126, 132.
(4) L. R. 4 Q. B. 180, 186.

down in *Brewster* v. *Kitchell* (1): 'Where H. covenants not to do an act or thing which was lawful to do, and an Act of Parliament comes after and compels him to do it, the statute repeals the covenant. So if H. covenants to do a thing which is lawful, and an Act of Parliament comes in and hinders him from doing it, the covenant is repealed.'" The principle of that case is, I think, applicable to the present case. It is true that the act to be performed was not rendered unlawful by an act of the Legislature passed since the entering into of the contract, but it was a lawful act of State which equally rendered the delivery of these specific goods impossible. Applying the principle of those cases, and bearing in mind also the principles laid down in *Krell* v. *Henry* (2), it seems to me that in this case the sellers were excused. It must be clearly understood, of course, that we are not in any way deciding that if the sale had not been of specific goods there would have been excuse; but it is because the sale is of specific goods, and is therefore rendered impossible of performance when the goods have been lawfully requisitioned, that I come to the conclusion that the sellers are excused. In my judgment, therefore, the answer to the second question is in the affirmative, that is, that the sellers were excused from carrying out their contract owing to the action of the British Government in requisitioning the wheat.

DARLING J. I agree. In regard to the first point I am of opinion that the property in the goods did not pass from the sellers to the buyers. It therefore becomes necessary to consider the second point. Now with regard to that I should merely desire to say this. In my opinion the law does not decree the doing of things impossible nor of things illegal, for that would be a negation of all law. If one contracts to do what is then illegal, the contract itself is altogether bad. If after the contract has been made it cannot be performed without what is illegal being done, there is no obligation to perform it. In the one case the making of the contract, in the other case the performance of it, is against public policy. It must be here

(1) (1697) 1 Salk. 198. (2) [1903] 2 K. B. 740.

1915

SHIPTON, ANDERSON & CO. AND HARRISON BROTHERS & CO.'S ARBITRATION, *In re*.

presumed that the Crown acted legally, and there is no contention to the contrary. We are in a state of war; that is notorious. The subject-matter of this contract has been seized by the State acting for the general good. Salus populi suprema lex is a good maxim, and the enforcement of that essential law gives no right of action to whomsoever may be injured by it.

LUSH J. I am of the same opinion. I think that Mr. Wright's contention was quite sound when he said that on the terms of this contract the vendors retained the power of disposition over these goods, because it was a term of the contract that until payment the vendors should retain what was called in the contract the transfer order, which I take it means the delivery order. Therefore the vendors stipulated that until payment was made the goods should remain in their possession, and I think that that retention of the jus disponendi prevented the property passing.

With regard to the other question, whenever it is necessary to consider, as it is in this case, whether a supervening impossibility of performance excuses the contracting party, one must of necessity consider what the nature of that impossibility is, and what has given rise to it. Willes J., in *Clifford* v. *Watts* (1), quoted the principle laid down in *Paradine* v. *Jane* (2) thus: "Where the law creates a duty or charge, and the party is disabled to perform it, without any default in him, and hath no remedy over, there the law will excuse him." In this case the impossibility which supervened after the making of the contract was an impossibility created by an act of State. It became, the moment these goods were requisitioned, the duty of the vendors to comply with it, and therefore what happened was that an act of law made it contrary to the duty of the vendors to carry out the contract to deliver a specific parcel of wheat to the buyers. That being so, the case clearly falls within the principle that has been so often acted upon, that inasmuch as there has been no default of the vendor, and inasmuch as that which made it impossible for him legally to perform his

(1) (1870) L. R. 5 C. P. 577, 586. (2) Aleyn, 26.

obligation was an act of State, it thereby followed that the vendor was excused from performance. The sellers, therefore, have committed no breach, and I think the question put by the arbitrators should be answered in the way indicated by my Lord.

Questions answered.

Solicitors for sellers: *Thomas Cooper & Co., for Batesons, Warr & Wimshurst, Liverpool.*

Solicitors for buyers: *Pritchard & Sons, for Collins, Robinson & Co., Liverpool.*

J. H. W.

ANNESS *v.* GRIVELL.

1915

July 21, 22.

Adulteration—Sale to Prejudice of Purchaser—Quality of Article demanded—Mixed Butter and Margarine—Sale of Food and Drugs Act, 1875 (38 & 39 *Vict. c.* 63), *s.* 6—*Sale of Food and Drugs Act Amendment Act*, 1879 (42 & 43 *Vict. c.* 30), *s.* 2—*Sale of Food and Drugs Act*, 1899 (62 & 63 *Vict. c.* 51), *s.* 8.

By s. 6 of the Sale of Food and Drugs Act, 1875, "No person shall sell to the prejudice of the purchaser any article of food . . . . which is not of the nature, substance, and quality of the article demanded by such purchaser," under a penalty.

By s. 2 of the Sale of Food and Drugs Act Amendment Act, 1879, it shall not be "a good defence to prove that the article of food . . . . in question, though defective in nature or in substance or in quality, was not defective in all three respects."

By s. 8 of the Sale of Food and Drugs Act, 1899, it "shall be unlawful to . . . . sell . . . . any margarine, the fat of which contains more than ten per cent. of butter fat . . . ."

An information was preferred by the respondent against the appellant and another for unlawfully selling to the prejudice of the purchaser mixed butter and margarine which was not of the nature, substance, and quality of the article demanded by the purchaser, there being a proportion of 80 per cent. of foreign fat, 15½ per cent. of water, curd, and salt, and 4½ per cent. of butter, contrary to the Sale of Food and Drugs Act, 1875. An agent of the respondent, acting upon his instructions, went to the appellant's shop and asked an assistant for two ounces of butter at 1*s.* 2*d.* per lb. The assistant informed the respondent's agent that the appellant did not sell butter at the shop at the price of 1*s.* 2*d.* per lb., but that he did sell a mixture of butter and margarine at 1*s.* 2*d.* which was very good. The respondent's agent stated to the assistant that she would have two ounces of the mixture, and the same was put up in a wrapper and supplied to her accordingly by the assistant upon payment of 1¾*d.* At the date of the

1915

ANNESS v. GRIVELL.

sale the retail price of margarine was 6*d*., 8*d*., and 10*d*. per lb., and the retail price of butter was 1*s*. 2*d*. to 1*s*. 6*d*. per lb.

The magistrate was of opinion that an offence had been committed on the ground that in view of the proportions of the several ingredients the mixture could be regarded only as a colourable one, and that in describing it as "very good" and selling it at the price named it was intended to deceive the purchaser by leading him to believe that it contained a substantial proportion of butter, whereas the analysis disclosing only a small percentage of butter fat showed that it contained no such substantial proportion. He accordingly convicted the appellant. On an appeal to the Divisional Court:—

Held, (1.) that the word "quality" in s. 6 of the Sale of Food and Drugs Act, 1875, means commercial quality of the article sold and not merely its description; (2.) that regard must be had to s. 8 of the Sale of Food and Drugs Act, 1899, which the magistrate had not before him, and which makes it unlawful to sell any margarine "the fat of which contains more than ten per cent. of butter fat." Therefore, when considering the amount of butter the purchaser of a mixture of margarine and butter had a right to expect, the law which makes it an offence to sell margarine mixed with more than 10 per cent. of butter must be taken into account, and it was impossible to hold that there was evidence in the present case of a colourable sale. The conviction must therefore be quashed.

CASE stated by a metropolitan magistrate.

An information was preferred by the respondent, Elias James Grivell, an inspector under the Sale of Food and Drugs Acts, 1875—1907, against the appellant, Henry Anness, and another, trading as Anness & Rooff, for that they, on February 3, 1915, unlawfully sold to the prejudice of the purchaser an article of food, to wit, mixed butter and margarine, which was not of the nature, substance, and quality of the article demanded by the purchaser, there being a proportion of 80 per cent. of foreign fat, 15½ per cent. of water, curd, and salt, and 4½ per cent. of butter, contrary to the Sale of Food and Drugs Act, 1875. (1)

(1) Sale of Food and Drugs Act, 1875 (38 & 39 Vict. c. 63), s. 6: "No person shall sell to the prejudice of the purchaser any article of food or any drug which is not of the nature, substance, and quality of the article demanded by such purchaser, under a penalty not exceeding twenty pounds; . . . ."

Sale of Food and Drugs Act, 1899 (62 & 63 Vict. c. 51), s. 8: "It shall be unlawful to . . . . sell . . . . any margarine, the fat of which contains more than ten per cent. of butter fat, and every person who . . . . sells . . . . any margarine which contains more than that percentage shall be guilty of an offence under the Margarine Act, 1887 . . . ."

1915

ANNESS v. GRIVELL.

On the hearing of the information the following facts were admitted or proved.

The appellant carried on business in copartnership with one Rooff under the style of Anness & Rooff at 414, Harrow Road, in the county of London. The business was that of grocers and provision dealers.

The respondent was an inspector duly appointed by the metropolitan borough of Paddington under the Sale of Food and Drugs Acts, 1875—1907.

On February 3, 1915, a Mrs. Blomfield, acting as agent for and upon the instructions of the respondent, went to the appellant's shop and asked an assistant at the shop for two ounces of butter at 1*s.* 2*d.* per lb. The assistant informed Mrs. Blomfield that the appellant did not sell butter at the shop at the price of 1*s.* 2*d.* per lb., but that he did sell a mixture of butter and margarine at 1*s.* 2*d.* which was very good. Mrs. Blomfield stated to the assistant that she would have two ounces of the mixture, and the same was put up in a wrapper and supplied to her accordingly by the assistant upon payment of $1\frac{3}{4}d.$ The respondent had followed Mrs. Blomfield into the shop, and Mrs. Blomfield forthwith handed the package containing the two ounces of the mixture to the respondent in the shop. The instructions given by the respondent to Mrs. Blomfield were verbal and were to the effect that if she could not obtain butter at 1*s.* 2*d.* she was to purchase the mixture and bring it to him. Mrs. Blomfield at the time of handing the package to the respondent verbally informed him that she had bought the contents thereof as a mixture. The respondent in accordance with s. 14 of the Sale of Food and Drugs Act, 1875, notified to the assistant his intention to have the contents of the package analysed by the public analyst. The respondent in the presence of the assistant divided the contents into three parts in accordance with s. 14 of the Act of 1875. One of the parts of the contents was duly submitted to the public analyst for the metropolitan borough of Paddington, and the analyst duly analysed the same and gave a certificate wherein he specified that as a result of the analysis he had found that the part contained 80 per cent. of foreign fat and that in 100 parts it contained

1915

ANNESS v. GRIVELL.

foreign fat 80 parts, butter fat 4½ parts, water, curd, and salt 15½ parts.

At the date of the sale the retail price of margarine was 6*d.*, 8*d.*, and 10*d.* per lb., and the retail price of butter was 1*s.* 2*d.* to 1*s.* 6*d.* per lb.

On behalf of the appellant it was contended—

(*a*) That the information disclosed no offence in that the article of food sold to the purchaser was shown on the face of the information to have been of the nature, substance, and quality of the article demanded by the purchaser, namely, mixed butter and margarine, and that accordingly the sale could not in law be to the prejudice of the purchaser.

(*b*) That the facts proved or admitted did not establish the offence alleged by the information in that the article of food sold to the purchaser was proved to have been of the nature, substance, and quality of the article demanded by the purchaser, namely, a mixture of butter and margarine, and that accordingly the sale was not and could not in law have been to the prejudice of the purchaser.

On behalf of the respondent it was contended—

(*a*) That inasmuch as the article sold contained 80 per cent. of foreign fat and only 4½ per cent. of butter it could not be honestly sold as a mixture of butter and margarine.

(*b*) That the price at which the article was sold, being the price at which genuine butter could actually be obtained, and the proportions of the ingredients were evidence that the transaction was fraudulent and that the article sold was sold to the prejudice of the purchaser and was not of the nature, substance, and quality of the article demanded.

On the facts stated above the magistrate was of opinion that an offence had been committed on the ground that in view of the proportions of the several ingredients the mixture could be regarded only as a colourable one, and that in describing it as "very good" and selling it at the price named it was intended to deceive the purchaser by leading him to believe that it contained a substantial proportion of butter, whereas the analysis disclosing only a small percentage of butter fat showed that it contained no substantial proportion. The magistrate

accordingly convicted the appellant and fined him 20*l.* and ordered him to pay 5*l.* 5*s.* costs.

The question for the opinion of the Court was whether the magistrate upon the above statement of facts came to a correct decision in point of law.

Barrington-Ward, for the appellant. Upon the facts no offence is disclosed.

(1.) The analysis certifies the mixture to be what it purported to be, namely, butter and margarine, and therefore the appellant committed no offence, it being a condition precedent that the analysis should show that a mixture not what it purported to be was sold.

(2.) The summons does not disclose any offence, because it charges the appellant with selling what he in fact sold.

The appellant is charged under s. 6 of the Sale of Food and Drugs Act, 1875, not under s. 8, which is entirely different.

Under s. 6, if the purchaser gets what he was told he was getting, then no offence is committed under that section. Here he did get a mixture of butter and margarine. An unfair proportion of one of the ingredients cannot make an offence under s. 6.

By s. 8 of the Sale of Food and Drugs Act, 1899, it is unlawful to sell margarine which contains more than 10 per cent. of butter. That section and the Sale of Butter Regulations, 1902, made by the Board of Agriculture under s. 4 of the Sale of Food and Drugs Act, 1899, contain the only statutory standards in respect of butter or butter mixture. The appellant has not contravened any of those standards. Beyond observing those standards nothing is required under s. 6 of the Act of 1875, except to tell the truth. Here the appellant gave to the purchaser's agent what he said he was selling her. Therefore there was no sale to the prejudice of the purchaser within s. 6 of the Act of 1875, because the appellant sold what he was asked for. There must be evidence that this was not, commercially, a mixture at all to justify this conviction. There is no such evidence. There is no evidence of a sale to the prejudice of the purchaser. There is no evidence that a merely colourable mixture was passed off as a genuine mixture.

1915

ANNESS v. GRIVELL.

The word "quality" in s. 6 of the Sale of Food and Drugs Act, 1875, means the description of the article sold, not its commercial value. For instance, Scotch, Irish, Lowland or Highland whiskies are of different qualities within the meaning of the section although they are of the same nature, and the meaning to be attached to the word "quality" is a limited one and is equivalent to kind or description, so that if a purchaser asked for Scotch whisky and got it he would have obtained the article of the "quality" he asked for whatever its commercial value might be.

Sect. 2 of the Sale of Food and Drugs Act Amendment Act, 1879 (42 & 43 Vict. c. 30), s. 2, under which it is an offence if the article is defective in any one of the three particulars mentioned in s. 6 of the Act of 1875, was enacted in consequence of the decision in *Davison* v. *M'Leod*. (1) [The Margarine Act, 1887 (50 & 51 Vict. c. 29), s. 3, and the Butter and Margarine Act, 1907 (7 Edw. 7, c. 21), were also referred to.]

A. A. Bethune, for the respondent. There is evidence upon which the magistrate could find that the article sold was not of the quality demanded. By "quality" in s. 6 of the Sale of Food and Drugs Act, 1875, is meant commercial quality.

The magistrate had to consider all the circumstances, including the price at which the mixture was offered. It was offered at the price of butter, and that offer implied that it contained a substantial proportion of butter. The fact that margarine must not contain more than 10 per cent. of butter is irrelevant. The seller must not make any representation that there is enough butter in the mixture to warrant the price of 1*s*. 2*d*. per lb. The question is whether there was evidence on which the magistrate could find that there was a sale to the prejudice of the purchaser. In taking the price into consideration he was acting in conformity with the decision in *Horder* v. *Meddings*. (2) The appellant charged nearly the price of butter for a substance in which there was in fact hardly any butter, and the magistrate was justified in holding that that was to the prejudice of the purchaser: *Star Tea Co.* v. *Neale*. (3) If the purchaser is deceived it must be a

(1) (1877) 42 J. P. 43. (2) (1880) 44 J. P. 234.
(3) (1909) 73 J. P. 511.

sale to his prejudice. It was the duty of the magistrate to determine whether the mixture was of the quality demanded, i.e., the commercial quality, and in arriving at that determination it was his duty to take the price into consideration, because that indicates the quality the purchaser is expecting. Upon the facts of the present case, even if the appellant had put into the mixture 10 per cent. of butter, the maximum amount allowed under s. 8 of the Sale of Food and Drugs Act, 1899, he would still have been liable to be convicted. In the present case the purchaser was induced to take an article much inferior to that which he had a right to expect. It is quite true that the mixture could not legally contain a substantial proportion of butter, but that does not protect the seller if he makes a representation by the price he charges that the mixture in fact contains a substantial proportion of butter. [The Sale of Food and Drugs Act, 1875, s. 8, was also referred to.]

Lord Reading C.J. The question in this case is whether the appellant was rightly convicted under s. 6 of the Sale of Food and Drugs Act, 1875, for having sold a mixture of butter and margarine which contained only 4½ per cent. of butter, 80 per cent. of foreign fat, and 15½ per cent. of water, curds, and salt. The purchaser asked for butter at 1*s.* 2*d.* per lb. The assistant informed the purchaser that the appellant did not sell butter at the shop at 1*s.* 2*d.* per lb., but that he did sell a mixture of butter and margarine at 1*s.* 2*d.* per lb. which was very good. The whole question is whether, upon that statement and the sale which accompanied it, the appellant can be convicted under s. 6 of the Act of 1875 of having sold an article to the prejudice of the purchaser which was not of the nature, substance, and quality demanded by the purchaser.

There has been some argument with reference to the meaning of the word "quality" in the section, and there has been a suggestion that "quality" is equivalent in the section to "description." I do not think that is so. In my judgment quality means commercial quality, and not the commercial description of the article.

But that does not decide this case. The magistrate's

1915

ANNESS v. GRIVELL.

Lord Reading C.J.

opinion was that, in view of the proportions of the several ingredients, the mixture could be regarded only as a colourable one. He based his conclusion entirely upon the relatively small proportion of butter that was introduced, and came to the conclusion that if 4½ per cent. of butter was introduced into a mixture of butter and margarine which was sold at 1*s.* 2*d.* per lb.—the lowest price of butter at that date—and was described as very good, that was in fact a sale of an article which must have contained, to comply with the conditions of the sale, more than 4½ per cent. of butter. I think the difficulty in the case has been caused entirely by the magistrate not having before him at the time of his decision s. 8 of the Sale of Food and Drugs Act, 1899, whereby it was made unlawful to manufacture, sell, expose for sale, or import any margarine the fat of which contains more than 10 per cent. of butter. Now in this case it is conceded that within the law it was impossible to sell a mixture of butter and margarine which contained more than 10 per cent. of butter fat, because if it contained more than that 10 per cent. of butter it would be an infringement of the Act of 1899, and an offence would be committed under s. 8 of that Act. Therefore when considering the quality which a person has a right to expect when he purchases a mixture of butter and margarine one must take into account the maximum percentage permissible in law. As the maximum permissible in the mixture sold was 10 per cent. of butter, but instead of 10 per cent. there was only 4½ per cent., it appears to me there was no evidence on which the magistrate could come to the conclusion that, in view of the proportion of the ingredients, the mixture could be regarded only as a colourable one, and in my judgment the decision he arrived at—as I am free to confess I should have done in the absence of the statute making more than 10 per cent. of butter in the mixture illegal—cannot be supported. There was a proportion of 4½ per cent. of butter to something less than 100 per cent. of margarine instead of a maximum of 10 per cent. If the magistrate had compared the 4½ per cent. with the maximum allowed by the statute he could not, in my judgment, have come to the conclusion that the proportion in the mixture made it

merely colourable. For that reason, and for that reason only, I am unable to agree with the decision of the learned magistrate, and I think this appeal should be allowed.

DARLING J. I am of the same opinion. I desire to say that I quite agree that the word "quality" in s. 6 of the Sale of Food and Drugs Act, 1875, means the commercial quality, and is not equivalent to such a word as "kind." I do not think we can limit it to the sort of use that Mr. Barrington-Ward suggested, on behalf of the appellant, in the illustration that a purchaser would ask for Scotch or Irish, Lowland or Highland whisky. I think it means quality in the sense which my Lord has indicated.

I also entirely agree that the magistrate fell into the mistake which he made because he had not considered that it was impossible to have, say, 50 per cent. of butter in the mixture. It was material for him in arriving at his decision to have the knowledge, which I do not think he had and which I should not have had except my attention were called to s. 8 of the Sale of Food and Drugs Act, 1899, that it is an offence to put more than 10 per cent. of butter into the whole mixture. If the decision of the magistrate were to be upheld it would place a vendor in a very difficult position. He commits an offence against the statute of 1899 if he puts into a mixture of margarine and butter more than 10 per cent. of butter. The magistrate has held that he is guilty of a fraud if he puts less than 5 per cent. into the mixture. It must be a very difficult thing to exactly make such a mixture as would keep him from being drawn in between the Scylla and Charybdis which would be provided by the Act of 1899 and the decision of the magistrate in the present case. I think this view is strengthened when it is considered that the value of this substance is reckoned by the pound although it is sold by the ounce, and that persons who ask for it sometimes only ask for two ounces. It cannot be conceived that this mixture is made by the ounce or two ounces; that just enough margarine and butter is taken to make a mixture of an ounce or even two ounces. It must be common knowledge commercially that the mixture is made in large quantities, and I should arrive at that

1915

ANNESS v. GRIVELL.

Darling J.

conclusion by the consideration that it is generally asked for not at so much an ounce but at so much a pound. Considering the difficulty of mixing a large quantity of butter and margarine in such a way that if, not a large quantity of it, but two ounces is taken, it is to be so thoroughly mixed that even in those two ounces the difficulty of not having more than 10 per cent. nor less than 5 per cent. of butter is to be avoided, it seems to me that the fact that these two ounces of the mixture did not satisfy that test is not evidence of a fraudulent intention on the part of the seller of the mixture.

LUSH J. I agree. I think it is important in dealing with cases of this class to bear in mind that the first question that one has to consider is, not whether the article sold was sold to the prejudice of the purchaser, but whether it was of the nature, substance, and quality demanded; because if it was of the nature, substance, and quality demanded, it is irrelevant that the article sold was sold to the prejudice of the purchaser.

Now it is enacted by s. 2 of the Sale of Food and Drugs Act Amendment Act, 1879, that it shall be sufficient for the complainant to show that the article sold was defective in any one of these three particulars. If it was of the nature and substance and yet was not of the quality demanded an offence has been committed. It seems to me impossible to say that the quality which is contemplated by s. 6 of the Sale of Food and Drugs Act, 1875, is not the commercial quality. If a commodity has various qualities, an expensive and good quality and a cheap inferior quality, if a person demanding the article pays the price which is known to be the price of the most expensive and the best quality, and the vendor palms off upon him an article of the cheapest and inferior quality, it seems to me that it is perfectly competent to the justices, when a complaint is made under s. 6 of the Sale of Food and Drugs Act, 1875, to take into consideration the price that the purchaser paid and infer from that that when the cheaper article or the cheaper quality of that article was given to him, but he was paying the price known to be the price of the higher quality, he was getting something not of the quality demanded. And equally if a person is

purchasing a mixture of two articles, if the price that he pays clearly indicates that he is demanding a mixture containing at least, say, 50 per cent. of the better article, and he in fact receives something which only contains 5 per cent. of it, I think it is perfectly competent for the magistrate to say that he is getting something delivered to him not of the quality demanded.

Now in the present case, if it were not for the fact that the Sale of Food and Drugs Act, 1899, by s. 8 prohibits the sale of a mixture containing more than 10 per cent. of butter, I should have thought that it was competent for the magistrate to draw the inference from the price and the facts that the article sold was not of the quality demanded. But when one recollects that 10 per cent. of butter is the maximum which the vendor is allowed to put into the mixture, it seems to me obvious that the purchaser must be taken to have demanded an article which could be legitimately sold—in other words he was demanding a mixture containing not more than 10 per cent. of butter, and if he got an article containing $4\frac{1}{2}$ per cent., I think it is quite impossible for the magistrate to have inferred from the price he paid that he was getting that which was not of the quality demanded. It is the difficulty imposed by the statute of 1899, which, in my view, makes the decision of the magistrate erroneous. For these reasons I agree that the appeal ought to be allowed.

Conviction quashed.

Solicitors for appellant: *W. T. Ricketts & Sons.*
Solicitor for respondent: *J. H. Hortin.*

J. E. A.

1915
Aug. 20

[COURT OF CRIMINAL APPEAL.]

THE KING *v.* WARD.

Criminal Law—Housebreaking Implements—Workman's Tools—Possession by Night—Lawful Excuse—Onus of Proof—Larceny Act, 1861 (24 & 25 *Vict.* c. 96), *s.* 58.

By s. 58 of the Larceny Act, 1861, it is an offence for a person to be found by night in possession of an implement of housebreaking "without lawful excuse (the proof of which shall lie on such person)":—

Held, that the onus of proof as to lawful excuse is discharged by an accused person if he prove that the alleged implement of housebreaking, though capable of being used for that purpose, is a tool used by him in his trade or calling.

APPEAL against conviction.

The appellant was indicted at the Middlesex Quarter Sessions for having been found by night in possession of certain implements of housebreaking, to wit, a crow and a screw-driver. (1)

The evidence of the witnesses for the prosecution showed that at 5.15 A.M. on June 21 the appellant was found in an old tramcar, which was used as a shed or dressing-room, in some playing fields at Craven Park, Stamford Hill. He had in his possession a bricklayer's chisel, which was the implement described in the indictment as a "crow," and a screw-driver.

The appellant gave evidence to the effect that he was a bricklayer, that the implement described as a crow was a bricklayer's chisel, and that the screw-driver and the chisel were used by him in his work as a bricklayer, and that when arrested he was on his way to a job.

The deputy-chairman, in his summing up, told the jury that the two tools were capable of being used for housebreaking and came within the words "implements of housebreaking," and that the appellant, having been found with the tools in his possession, was prima facie guilty unless he could show lawful excuse, and

(1) The Larceny Act, 1861 (24 & 25 Vict. c. 96), s. 58, provides that whosoever "shall be found by night having in his possession without lawful excuse (the proof of which shall lie on such person) any pick-lock key, crow-jack, bit or other implement of housebreaking" shall be guilty of a misdemeanour.

that the appellant had to satisfy the jury that he was rightly in possession of the tools at the time and that he had no unlawful intention.

The appellant was convicted.

H. D. Roome, for the appellant.

[LORD READING C.J. The Court wish to hear counsel for the Crown on the question whether the jury were rightly directed as to the onus of proof.]

Austin Metcalfe, for the Crown. The tools found on the appellant were capable of being used as implements of housebreaking, although they were bricklayers' tools. The onus was therefore on the appellant, under s. 58, to satisfy the jury that he had a lawful excuse for having the tools in his possession: *Reg.* v. *Oldham.* (1) The appellant did not discharge that onus merely by proving that he was a bricklayer.

The judgment of the COURT (Lord Reading C.J., Ridley and Bailhache JJ.) was delivered by

LORD READING C.J. The appellant was convicted of having been found by night in the possession of implements of housebreaking. The deputy-chairman of the Middlesex Quarter Sessions directed the jury that it was for the appellant to establish to their satisfaction that he was at the time in question in lawful possession of the implements. The question raised by this appeal is whether, in the circumstances, that was a right and proper direction. The implements were a screw-driver and a chisel, and it was admitted by the prosecution that these tools form part of the outfit of a bricklayer. It is true to say, on the authority of *Reg.* v. *Oldham* (1), that a tool which is commonly used for a lawful purpose may become an "other implement of housebreaking" within the meaning of s. 58 of the Larceny Act, 1861, if it is in the possession of a person who intends to use it for that purpose. Therefore, one question in this case was whether it was the intention of the appellant to use this chisel and screw-driver for the purpose of housebreaking, and it was for the appellant to satisfy the jury that, in the words of s. 58, he

(1) (1852) 2 Den. C. C. 472; 21 L. J. (M.C.) 134.

1915

REX v. WARD.

had a "lawful excuse" for being in the possession of these tools. It was stated by the appellant in his evidence and not disputed by the prosecution that he was a bricklayer. That being so, and the tools being admittedly bricklayers' tools, the appellant had established prima facie that he had a lawful excuse for being in the possession of the tools, and the onus was shifted on to the prosecution to prove to the satisfaction of the jury, if they could, from the other circumstances of the case that the appellant was not in the possession of the tools for an innocent purpose but for the purpose of housebreaking. But the jury were directed that, although the appellant was a bricklayer and the tools were bricklayers' tools, the onus still lay on the appellant to satisfy them that he was in lawful possession of the tools, that is to say, that he had no intention of using the tools for the purpose of housebreaking. In our opinion that direction cannot be supported. The jury should have been directed that it was for the prosecution to satisfy them from the other circumstances of the case that, although the appellant was a bricklayer and the tools were bricklayers' tools, he had no lawful excuse for being in possession of these tools at that particular time and place.

As we are of opinion that the jury were not properly directed on the question of the onus of proof, the conviction cannot stand and must be quashed.

Appeal allowed.

Solicitor for appellant: *Registrar of Court of Criminal Appeal.*

Solicitor for the Crown: *Director of Public Prosecutions.*

F. O. R.

STOKE-ON-TRENT BOROUGH COUNCIL *v.* CHESHIRE COUNTY COUNCIL.

1915
June 11.

Local Government—Youthful Offender—Place of Residence—Maintenance by Local Authority—Constructive or Actual Residence—Children Act, 1908 (8 *Edw.* 7, *c.* 67), *s.* 74, *sub-s.* 7.

The words "place of residence of a youthful offender" in s. 74, sub-s. 7, of the Children Act, 1908, mean the place where the youthful offender is actually living. Therefore if he is not in fact living with his parents he cannot, within the meaning of the sub-section, be considered as constructively residing with them.

CASE stated by justices for the county of Chester.

At a Court of summary jurisdiction sitting at Sandbach, in the county of Chester, on November 10, 1914, a young person named Charles Fryer appeared to answer four charges of larceny and was ordered to be sent to a reformatory until he should have attained the age of nineteen years. Fryer's place of residence was specified in the order as "Taylor Street, Goldenhill in the county of Stafford," which is in the county borough of Stoke-on-Trent.

Being aggrieved by the decision of the Court as to the place of residence of the young person, the appellants, the borough council of Stoke-on-Trent, applied under s. 74, sub-s. 7, of the Children Act, 1908 (1), to a Court of summary jurisdiction sitting at Sandbach and complained that the young person was resident at

(1) Children Act, 1908 (8 Edw. 7, c. 67), s. 74, sub-s. 1: "Where a youthful offender is ordered to be sent to a certified reformatory school, it shall be the duty of the council of the county or county borough in which he resides (to be specified in the order) to provide for his reception and maintenance in a certified reformatory school suitable to the case, having regard to the requirements of this Part of this Act."

Sub-s. 3: "For the purposes of the foregoing provisions of this section a youthful offender . . . . shall be presumed to reside in the place where the offence was committed . . . . unless it is proved that he resided in some other place."

Sub-s. 7: "Where a local authority, that is to say, as respects reformatory schools the council of a county or county borough . . . . are aggrieved by the decision of a Court as to the place of residence of a youthful offender . . . . they may within three months after the making of the detention order apply to a petty sessional court acting in and for the place for which the Court which made the order or determined the place of residence acted, and

1915

STOKE-ON-TRENT BOROUGH COUNCIL v. CHESHIRE COUNTY COUNCIL.

Arclid, in the area of the respondents, the Cheshire County Council.

Upon the hearing of the latter application the respondents were given an opportunity of being heard and the justices refused to transfer the liability to maintain the young person.

Fryer was born on April 7, 1899, and lived with his parents at Kidsgrove, in the county of Stafford, outside the county borough of Stoke-on-Trent, until June, 1914.

In June, 1914, he went with his parents and lived with them at Doncaster, in the county of York, for about four months. At the beginning of October, 1914, his father returned alone from Doncaster and went to live with a relative at Talke Pits, outside the county borough of Stoke-on-Trent, and on October 10, 1914, Fryer joined his father at Talke Pits aforesaid and resided with him there.

On October 12, 1914, Fryer left Talke Pits and went to work for one Harry Kennerley, a farmer at Smallwood, in the county of Chester. On his engagement by Kennerley the employment was not expressed to be for any definite period of time. He was employed at Smallwood up to Monday morning, November 2, 1914. He slept and had his food at Kennerley's house, his food being supplied by Kennerley. He was paid in addition the sum of 3*s.* 6*d.* per week as wages by Kennerley.

On October 27, 1914 (the remainder of the family having in the meantime left Doncaster), Fryer's father left Talke Pits and went to reside with his family at 8, Taylor Street, Goldenhill, within the county borough of Stoke-on-Trent.

Fryer visited his parents at 8, Taylor Street, Goldenhill, on Saturday afternoon, October 31, 1914, for the purpose of changing his clothes and returned to Kennerley's house at Smallwood the same day.

On Monday, November 2, 1914, Fryer left Kennerley's employment at Smallwood by agreement with Kennerley to take up

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that Court, on proof to its satisfaction that the youthful offender . . . . was resident in the area of another local authority, and after giving such other local authority an opportunity of being heard, may transfer the liability to maintain the youthful offender . . . . in a certified school to that other local authority . . . ."

employment with one John Broad, a farmer at Spring Bank Farm, Arclid, also in the county of Chester. He worked on the Spring Bank Farm from Monday, November 2, until Thursday, November 5, when he was arrested by the police. On his engagement by Broad the employment was not expressed to be for any definite period of time. One of the terms of Fryer's engagement was that he should be paid wages by Broad at the rate of 3*s.* 6*d.* per week and that his board and lodging in addition should be provided by Broad, but as he was only in Broad's employment for four days, no wages were actually paid by Broad to him. He slept at Broad's house on the nights of November 2, 3, and 4.

Fryer was stated by Broad to be a good worker, and if he had not been arrested Broad would have retained his services.

Fryer's parents had contributed nothing towards his maintenance from October 12, 1914, to November 5, 1914, the date of his arrest.

When Fryer left Talke Pits on October 12, 1914, he had sufficient clothes at some time provided by his parents, and none had been bought for him between that date and November 5, 1914, the date of his arrest.

Fryer had never slept at 8, Taylor Street, Goldenhill.

On behalf of the appellants it was contended that—

1. The young person had left his parents' home at Talke Pits and had gone out to earn his own living, had become self-supporting, and was resident in the county of Chester within the meaning of s. 74 of the Children Act, 1908.

2. That it is the young person's physical residence and not the residence of his parent that is referred to in s. 74.

3. That residence and not poor law settlement is the test under s. 74.

On the part of the respondents it was contended—

1. That the young person had only left home temporarily, not permanently.

2. That there was no break of residence.

3. That the parents' residence must be considered as the young person's residence as he was legally under the control of his father until sixteen years of age and could be considered as constructively residing with his parents.

1915

STOKE-ON-TRENT BOROUGH COUNCIL v. CHESHIRE COUNTY COUNCIL.

The attention of the justices was directed to the following cases by the appellants:—*Reg.* v. *Leeds Union* (1); *Rex* v. *Inhabitants of North Curry* (2); *Reg.* v. *St. Leonard, Shoreditch* (3); *Blackwell* v. *England* (4); and by the respondents to *Reg.* v. *Abingdon* (5); *Ipswich Union* v. *Forehoe Union* (6); *Guardians of Amersham Union* v. *Guardians of City of London Union.* (7)

The justices, being of opinion upon the foregoing facts that the young person had no definite settled employment, that he visited his father's home for the purpose of changing his clothes which were apparently kept there, that his residence at Arclid was only of a temporary nature, and that he, being under sixteen years of age and under the control of his parents, constructively resided with his parents at 8, Taylor Street, Goldenhill, held that the appellants were liable for his maintenance and declined to make any order transferring the liability to maintain him to the county of Chester.

The question for the opinion of the Court was whether the justices came to a correct determination in point of law.

W. Mackenzie, K.C., and *Horace Fenton*, for the appellants. There was no evidence upon which the justices could find that Fryer resided within the borough of Stoke-on-Trent. His father had only resided within the borough for nine days. Fryer was employed for an indefinite period of time, terminable by a week's notice, at Arclid, in the county of Chester, and was residing there with his employer. For the purpose of irremovability his place of residence would be Chester. [Sect. 44, s. 57, sub-s. 2, and s. 65, clause (*b*), of the Children Act, 1908, were also referred to.]

Montgomery, K.C., and *Hugo Marshall*, for the respondents. The question is what is the meaning of the words "place of residence" in s. 74, sub-s. 7, of the Children Act, 1908. The answer to that question depends upon the particular purpose of

(1) (1879) L. R. 4 Q. B. 323.
(2) (1825) 4 B. & C. 953, at p. 959.
(3) (1865) L. R. 1 Q. B. 21.
(4) (1857) 8 E. & B. 541.
(5) (1870) L. R. 5 Q. B. 406.
(6) (1913) 77 J. P. 467.
(7) (1887) 20 Q. B. D. 103.

1915

STOKE-ON-TRENT BOROUGH COUNCIL v. CHESHIRE COUNTY COUNCIL.

the statute. "Residence" is not a term of art. It may either mean the place a person is actually residing at or it may mean where he is employed. The Act of 1908 points to the question being one of fact and not of law. By s. 74, sub-s. 4, if a Court of quarter sessions makes the detention order, that Court is not to deal with the question of residence, but is to remit it to a Court of summary jurisdiction for the place where the youthful offender was committed for trial for determination. Fryer resided with his parents for the purposes of the Act of 1908. The authorities upon the question as to residence for the purpose of the franchise are of no assistance, for the franchise depends upon permanent residence. If there was any evidence upon which the justices could come to the conclusion they did, the Court cannot interfere. If Fryer had been asked where he resided he would have replied "at my father's house." His age and the fact that he had only been away from his parents for a fortnight and that he changed his clothes at home are factors in the determination of the question, and they constitute evidence upon which the justices could find that his father's home was his place of residence.

LORD READING C.J. The question in this case is where a youthful offender, who was convicted of larceny and sent to a reformatory school, resided within the meaning of s. 74 of the Children Act, 1908, at the time of committing the offence. By s. 74, sub-s. 3, of the Act a youthful offender shall be presumed to reside at the place where the offence was committed, unless it is proved that he resided in some other place. By s. 74, sub-s. 7, there is power in a local authority, when an order has been made declaring that a youthful offender is resident in their district, and consequently he is to be sent to a reformatory under their jurisdiction, to apply to a petty sessional court, and that court, on proof that the youthful offender "was resident in the area of another local authority, and after giving such other local authority an opportunity of being heard, may" (which means "must") "transfer the liability to maintain the youthful offender" to that other local authority.

In the present case the facts proved before the justices on the application under s. 74, sub-s. 7, were that the youthful offender

1915

STOKE-ON-TRENT BOROUGH COUNCIL v. CHESHIRE COUNTY COUNCIL.

Lord Reading C.J.

had been in the employment of a farmer named Kennerley, in the county of Chester, in October, 1914, and on November 2, 1914, he left the employment of Kennerley and went to take up employment with another farmer named Broad at a place called Arclid, also in the county of Chester. He worked there from November 2 to November 5, when he was arrested by the police, and he was eventually convicted and sent to a reformatory school. At the time he was taken into employment by Broad no stipulation was made as to the length of time he was to be employed by him. He slept at Broad's house for three nights, and his food was supplied by Broad, and Broad was to pay him wages at the rate of 3*s.* 6*d.* a week.

The question is whether on those facts the justices were right in coming to the conclusion that the youthful offender was not resident at Arclid in the county of Chester on the ground that his residence there was only of a temporary nature, and that, being under sixteen years of age and under the control of his parents, he was constructively resident with them in Stoke-upon-Trent. The justices came to the conclusion that the Stoke-upon-Trent Corporation had not proved that the youthful offender was resident in the county of Chester within the meaning of s. 74, sub-s. 7, of the Children Act, 1908. If there was any evidence on which the justices could arrive at the conclusion they did upon the facts proved before them, then, even though we might have come to a different conclusion, we ought not to interfere. But if on the facts as proved it was not possible, as a matter of law, that they could come to the conclusion that the youthful offender was constructively resident with his parents, we must overrule their decision. In my judgment upon the facts as proved there was no evidence that at the time in question the youthful offender was resident with his parents. It is worthy of observation that the justices did not find that he was in fact resident with his parents, but only that he was constructively resident with them in the borough of Stoke-upon-Trent, although he was in fact at Broad's farm, where they considered his residence to be of a temporary nature. I think, however, that "residence" in the section must be construed in the ordinary way and according to the ordinary meaning of language. It is

not a term of art, and under different statutes there are various decisions as to the meaning of the word in those statutes. In this case we must look at this statute and come to our conclusion upon it alone. The statute provides that it is to be presumed that the youthful offender resides where the offence was committed, unless it is proved that he resides elsewhere. In my judgment a youthful offender is, within the meaning of the section, resident where he lives, that is where he has his bed, and where he dwells. Applying that test, I cannot see any distinction between this case and that of a domestic servant who may, between the age of twelve and sixteen years, enter into employment. The youthful offender was to sleep in the employer's house and to be boarded there, and the engagement was not a merely casual one. That a servant is subject to dismissal summarily if facts are proved which justify summary dismissal does not make the employment casual. The youthful offender was employed in the ordinary sense. There is nothing to indicate that his residence with Broad was of a temporary nature. It followed the ordinary course. If it was of a temporary nature, every case of residence at an employer's house must be temporary. In a strict sense no employment is permanent. Though this employment only lasted two or three days, the boy was employed in the ordinary way. There is no statement in the case that his employment was merely casual. So far as one can see, the intention was that it should continue. For these reasons the justices' decision cannot stand, and the appeal must be allowed.

Ridley J. I am of the same opinion. Sect. 74, sub-s. 3, of the Children Act, 1908, provides that the youthful offender shall be presumed to reside in the place where the offence was committed unless it is proved that he resided in some other place. The offence was committed in Cheshire, and, therefore, he must be presumed to have resided in Cheshire, unless it is proved that he resided elsewhere. The justices have found that the residence was temporary, and that the boy had no definite settled employment, that he visited his father's home for the purpose of changing his clothes, and that, being under sixteen years of age, he was

1915

STOKE-ON-TRENT BOROUGH COUNCIL v. CHESHIRE COUNTY COUNCIL.

Ridley J.

under the control of his parents, and constructively resided with them in the borough of Stoke-upon-Trent. I think that reasoning erroneous. The place of residence of a person is the place where he eats, drinks, and sleeps. That definition is to be found in *Rex* v. *Inhabitants of North Curry* (1), a somewhat ancient authority, and a decision which no doubt related to a different statute: but it has been recognized for many years. In that case Bayley J. said: "It is also stated in Nolan's Poor Laws, 3rd ed., p. 72, that personal property cannot be rated unless the proprietor resides in the parish. Then the question is, what is the meaning of the word 'resides'? I take it that that word, where there is nothing to show that it is used in a more extensive sense, denotes the place where an individual eats, drinks, and sleeps, or where his family or his servants eat, drink, and sleep." That is the generally accepted meaning of the word. If a person leaves his residence for the purpose of permanently living elsewhere, then he changes his residence. In the present case if the youthful offender's residence with Broad had been temporary, and if the real place where he ate, drank, and slept had been in Stoke-upon-Trent, he would not have lost his residence there by going to stay at a farm for a temporary purpose. If, for example, he had gone for a few days in order to get country air, his residence would still have been with his father at Stoke-upon-Trent. But the boy's residence at the farm with Broad was not temporary. His father lived in Stoke-upon-Trent, but the fact that the boy had a suit of clothes there did not make him a resident there. It seems to me that he was not in statu pupillari, but was employed by the farmer in an adult capacity; and it is impossible to say that he was not residing with the farmer because his residence there was of a temporary nature or because he went to his father's house to change his clothes.

AVORY J. I am of the same opinion. I only wish to add a few words as to Mr. Montgomery's contention that the question with which we have to deal is one of fact. In my opinion it is a question of law. Mr. Montgomery was right in saying that the word "residence" is capable of various constructions

(1) 4 B. & C. 959.

1915

STOKE-ON-TRENT BOROUGH COUNCIL v. CHESHIRE COUNTY COUNCIL.

Avory J.

according to the statute in which it appears. I am satisfied that in the Children Act, 1908, it means the place where the person actually resides, as distinguished from the place where he may be said constructively to reside. In my judgment the justices were wrong in law in that respect, for it is clear that they have held that the statute is satisfied by the youthful offender having a constructive residence with his father. I think that they were also wrong in law in holding that there was evidence that the boy was residing with his father. There was no evidence of residence, either actual or constructive, with his father. On both those points the magistrates were wrong.

Case remitted.

Solicitors for appellants: *Gibson & Weldon, for E. B. Sharpley, Town Clerk, Stoke-on-Trent.*

Solicitors for respondents: *Philpot & Co., for Reginald Potts, Chester.*

J. E. A.

CHATTERTON *v.* GLANFORD RURAL DISTRICT COUNCIL.

1915

June 8, 9.

Local Government—Street—Private Street Works—Provisional Apportionment—Premises not abutting on Street—"Access through court, passage, or otherwise"—Private Street Works Act, 1892 (55 & 56 *Vict. c.* 57), *s.* 10.

By s. 10 of the Private Street Works Act, 1892, an urban authority about to execute private street works in any street may include in a provisional apportionment of the expenses of the works "any premises . . . . which do not front, adjoin, or abut on the street or part of a street, but access to which is obtained from the street through a court, passage, or otherwise," and which will in their opinion be benefited by the works.

The respondents, who were invested with the urban powers conferred by the Act of 1892, had included the appellant's premises in a provisional apportionment in respect of the estimated expenses of metalling, flagging, channelling, and making good a part (about 460 feet in length) of a street named Grange Lane, which was not a public highway or street.

The appellant's premises did not front or abut upon that portion of Grange Lane upon which the works were being carried on, but access

1915

CHATTERTON v. GLANFORD RURAL COUNCIL.

therefrom to the premises was obtained through the remaining portion of Grange Lane, a length of about 516 yards :—

Held, that the words "court, passage, or otherwise" mean a court or passage or something in the nature of a court or passage, but do not mean a portion of the street itself; and therefore access to the appellant's premises was not obtained through a "court, passage, or otherwise" within the meaning of the section, and the section did not empower the respondents to include the appellant's property in the provisional apportionment.

Dictum of Lord Alverstone C.J. in *Newquay Urban Council* v. *Rickeard* [1911] 2 K. B. 846 explained.

CASE and supplemental case stated by justices for the Parts of Lindsey, Lincolnshire.

An application was made to the justices sitting as a Court of summary jurisdiction by the respondents, the Rural District Council of Glanford, Brigg, to determine the matter of certain objections made by the appellant, Frank Chatterton, to a provisional apportionment of expenses made by the respondents under s. 10 of the Private Street Works Act, 1892 (1), in respect

(1) Private Street Works Act, 1892 (55 & 56 Vict. c. 57), s. 6, sub-s. 1: "Where any street or part of a street is not sewered, levelled, paved, metalled, flagged, channelled, made good, and lighted to the satisfaction of the urban authority, the urban authority may from time to time resolve with respect to such street or part of a street to do any one or more of the following works (in this Act called private street works); that is to say, to sewer, level, pave, metal, flag, channel, or make good, or to provide proper means for lighting such street or part of a street; and the expenses incurred by the urban authority in executing private street works shall be apportioned (subject as in this Act mentioned) on the premises fronting, adjoining, or abutting on such street or part of a street. Any such resolution may include several streets or parts of streets, or may be limited to any part or parts of a street."

Sect. 10: "In a provisional apportionment of expenses of private street works the apportionment of expenses against the premises fronting, adjoining, or abutting on the street or part of a street in respect of which the expenses are to be incurred shall, unless the urban authority otherwise resolve, be apportioned according to the frontage of the respective premises; but the urban authority may, if they think just, resolve that in settling the apportionment regard shall be had to the following considerations (that is to say,)

"(*a*) The greater or less degree of benefit to be derived by any premises from such works;

"(*b*) The amount and value of any work already done by the owners or occupiers of any such premises.

of certain works proposed to be executed in a street within the district of the respondents known as Grange Lane, in the parish of Ashby, which apportioned a part of the expenses on the appellant.

Upon the hearing of the matter the following facts were admitted or proved in evidence before the justices.

The respondents are a rural sanitary authority invested with the urban powers conferred by the Private Street Works Act, 1892.

The Act of 1892 was duly adopted by the respondents and came into force and was applied to Grange Lane, which is within the district of the respondents, pursuant to an order of the Local Government Board on August 4, 1909.

The appellant is the owner of a farmhouse, cottage, farm buildings and land to which access is obtained over Grange Lane, but which do not front upon that portion of Grange Lane upon which the proposed works were intended to be executed. The justices found by their supplemental case that Grange Lane was not a public highway or street.

On October 17, 1912, the respondents resolved, in pursuance of s. 6, sub-s. 1, of the Act of 1892, to level, pave, metal, flag, channel, and make good part of Grange Lane. Grange Lane is a street within the meaning of s. 5 of the Act. The amount of expenses apportioned against the appellant was 12*l.* 10*s.*

The appellant duly objected to the proposals of the respondents on the ground (inter alia) that the premises ought to be excluded from the provisional apportionment.

The respondents in settling the provisional apportionment on June 26, 1913, passed the following resolution:—

"Resolved that in the provisional apportionment ordered by the council on October 17 last to be made by Mr. W. H. Buttrick, the surveyor of the council, the apportionment of expenses

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"They may also, if they think just, include any premises which do not front, adjoin, or abut on the street or part of a street, but access to which is obtained from the street through a court, passage, or otherwise, and which in their opinion will be benefited by the works, and may fix the sum or proportion to be charged against any such premises accordingly."

1915

CHATTERTON v. GLANFORD RURAL COUNCIL.

against the premises fronting, adjoining, or abutting on the street or part of the street in respect of which the expenses are incurred shall be apportioned as under :—

"12*l.* 10*s.* in respect of land belonging to Mr. Frank Chatterton access to which is obtained from Grange Lane through a court, passage, or otherwise and which in the opinion of the council will be benefited by the works.

"The remainder of the said expenses to be apportioned according to the frontage of the respective premises."

Grange Lane runs from north to south out of the main street in Ashby, which runs from east to west. The intended works were proposed to be executed over Grange Lane for a distance of 460 feet or thereabouts measured southwards from the main street, and the primary object of executing the works was to provide a better road for the owners and occupiers of a block of houses situate on the west side of Grange Lane and fronting upon the whole length of that portion of it in respect of which the proposed works were intended to be executed. Grange Lane at its southern end terminated at the appellant's farm, at which in addition to the farm buildings there was a farmhouse and one cottage, both of which were occupied. Grange Lane was the only means of access to the greater portion of the appellant's farm and the primary means of access to the remainder of it. The nearest portion of the proposed works to the appellant's farm was 516 yards. The total estimate was 303*l.* 8*s.* 3*d.*, which was apportioned between the owners of the block of houses on the western side of the street already referred to, the owner of the land co-extensive with the proposed works on the other side of the street, the owners of the land on either side fronting the other portion of Grange Lane which lies between the appellant's farm and the southern extremity of the proposed works, and the appellant.

It was contended on behalf of the appellant (inter alia) that the apportionment charged against him had been so charged under an entire misinterpretation of the meaning of s. 10 of the Act of 1892, and that the apportionment was ultra vires on the ground that the access to the appellant's farm was not through a court, passage, or otherwise. The distance of 516 yards from

the appellant's farm to the nearest point of the proposed works was commented on, and it was argued that if s. 10 could be made applicable to the existing circumstances there could be no limit whatever to its interpretation.

The justices decided (inter alia) that s. 10 of the Act of 1892 empowered the respondents to include the appellant's property which obtained access over a road not repairable by the public at large to an improved street though it did not actually front or abut upon or adjoin it, and they therefore confirmed the proposals of the respondents.

The question for the opinion of the Court was whether the justices came to a correct determination in point of law.

T. Cuthbertson (for *J. W. Jardine*, serving with His Majesty's Forces), for the appellant. The question is whether that part of Grange Lane upon which the works are not being carried out and which is the approach to the appellant's premises from the part of Grange Lane upon which the works are being carried out is "a court, passage, or otherwise" within the meaning of s. 10 of the Private Street Works Act, 1892. That section draws a distinction between the street with which it deals and the court or passage giving access to it. The court or passage is to give access to the street or part of the street upon which the works are being carried out under s. 6, sub-s. 1. If the decision of the justices is upheld the effect would be that it would be possible to charge all the persons whose premises abutted on any part of the street as well as those whose premises actually abutted on the portion to be paved. That is not the true construction of the section. A "court, passage, or otherwise" means something which may be described as a feeder to the street. Some limitation must be placed on the word "otherwise." It cannot have so wide a meaning as to include the street itself. [He also contended that Grange Lane was a public street, but as the Court held that they were bound by the finding of the justices that it was not a public street, the arguments under that head are omitted.]

C. E. Dyer, for the respondents. The words "court, passage, or otherwise" in s. 10 of the Private Street Works Act, 1892,

1915

CHATTERTON v. GLANFORD RURAL COUNCIL.

are intended to enlarge the powers of the justices with regard to the persons upon whom they may apportion the expenses. The words "or otherwise" ought not to be limited to something in the nature of a court or passage. They mean "means of access." It can be truly said that access is gained to the appellant's premises from the part of the street in which the works are being carried on through the rest of the street. The words "or otherwise" must not be read as in any sense ejusdem generis with "court or passage." The judgment of Lord Alverstone in *Newquay Urban Council* v. *Rickeard* (1) shows that that is the true construction of the section.

LORD READING C.J. The appellant is the owner of a farm known as South Grange Farm, being a farmhouse, cottage, farm buildings and land, situate at the southern end of Grange Lane, and the respondents, under the urban powers vested in them by the Private Street Works Act, 1892, proposed to level, pave, and make good part of Grange Lane. Grange Lane is a street within the meaning of the Private Street Works Act, 1892. Access to the appellant's premises is obtained over Grange Lane, but the premises do not front upon that portion of Grange Lane in respect of which the respondents propose to do the work. The respondents made a provisional apportionment of the expenses of the proposed works upon the appellant under s. 10 of the Act of 1892. The appellant objected that access to his premises was not obtained from the portion upon which the proposed works were intended to be executed "through a court, passage, or otherwise" within the meaning of the section. It appears that the intended works were proposed to be executed in the street over a portion measuring 460 feet or thereabouts from its junction with the main street. It was contended on behalf of the appellant that access from the portion of the street upon which the proposed works were intended to be done to the premises was not obtained "through a court, passage, or otherwise." That depends upon the meaning we give to those words. The object

(1) [1911] 2 K. B. 846.

of the statute appears to have been to give the local authority power, when certain conditions are present, to apportion the expenses of these works upon the premises which do not abut or front upon the proposed works. Under s. 10, if the authority thinks it just, and if they are of opinion that the owner of premises benefits by the proposed works, they may apportion the expenses on such owner notwithstanding that the premises do not front or abut on the works, if access thereto from the part of the street upon which the repairs are to be executed is obtained "through a court, passage, or otherwise." The Legislature intended that the local authority should not be restricted to premises fronting or abutting on the street or part of the street. The sole question in this case is whether s. 10 applies. I have come to the conclusion that the words "or otherwise" must mean some means of access of a similar character to that of a court or passage. I cannot think that when the Legislature used this language they meant to give to the words "or otherwise" a wider meaning as regards access and character of access than would be attributable to the words "court or passage." It seems to me that what is meant is access through a court or passage or something similar to a court or passage, and not through a street. If it had been intended to include a street, I should have expected the word "street" to have been placed before the words "court, passage, or otherwise," more especially as those words are preceded by the words "street or part of a street." In my judgment the words "court, passage, or otherwise" were used to distinguish the things mentioned from a street. If that be the true meaning of the words it follows that the justices were wrong, for access to the appellant's premises was not obtained through a court or passage or through anything of a similar character to a court or passage, but through a street. If that portion of the street upon which the proposed works were intended to be carried out were called A Lane and the unmade portion were B Street, it seems to me the difficulties would vanish, for I do not think it could be said that access to these premises was obtained from A Lane through a court, passage, or otherwise when it was obtained through B Street. The conclusion at which I have arrived is that

1915

CHATTERTON v. GLANFORD RURAL COUNCIL.

Lord Reading C.J.

when access to premises from the portion of the street upon which it is intended to carry out the proposed works is through the remaining part of the street, which together form the street in which the apportionment is made, s. 10 of the Act of 1892 does not apply.

Perhaps in giving this decision I may be said to be differing from the language used by some members of the Court in *Newquay Urban Council* v. *Rickeard* (1); but the decision in that case was that, as the access was through a public street, s. 10 did not apply. The general language used by Lord Alverstone was not necessary for the decision. Indeed, I doubt whether, when he said (2) "I decline to hold that premises which have such access are not to be included in an apportionment because the means of access may be of a width greater than that which is usual for a court or passage, or that they are only to be included when the access is by means of a court or passage or something of that character," he intended to lay down that a wider meaning is to be given to the words "or otherwise" than we are giving to them. But this part of his judgment was not necessary for the decision, and I am unable to accept the view there expressed if it gives wider meaning to the words. He puts as a test that the access must be by some means other than that obtained by the premises actually fronting, adjoining, or abutting. I accept that test. The only question is as to the meaning of the words "or otherwise," and as to that I have expressed my opinion. The appeal must be allowed.

RIDLEY J. I am of the same opinion, and do not wish to add anything.

AVORY J. I agree. I think it is important to notice that the resolution of the respondents to pave, &c., and the apportionment of expenses are both made under s. 6, sub-s. 1, of the Private Street Works Act, 1892, and that they are limited in terms to a part of this street, namely, the portion measuring 460 feet in length. It is clear that under s. 6, sub-s. 1, the expenses have to be apportioned on the premises fronting,

(1) [1911] 2 K. B. 846. (2) [1911] 2 K. B. at p. 851.

adjoining, or abutting on the part to be paved, &c., and cannot be apportioned on any other premises. In my view it is important to bear that in mind when we come to construe s. 10. In this particular case it is stated that in addition to the apportionment on the appellant there is also an apportionment on the owners of premises further down Grange Lane, and not fronting, &c., the portion upon which the proposed works were intended to be carried out. The respondents appear to have construed the Act of 1892 as entitling them to apportion the expenses on the owners of all the premises in the street, including those abutting on that part of it not proposed to be paved, &c. Construing s. 10 in the light of s. 6, sub-s. 1, it appears to me that the proviso in the former section, empowering them to apportion expenses on premises "which do not front, adjoin, or abut on the street or part of a street, but access to which is obtained from the street through a court, passage, or otherwise," must be read as governed by the doctrine of ejusdem generis, and that the words "or otherwise" must be limited, as Pickford J. said in *Newquay Urban Council* v. *Rickeard* (1), to something which gives access in the same way as does a court or passage. I think he meant that there must be something of the same character as a court or passage. It is clear that access from the portion that is being paved, &c., by a street or by another portion of this street is not access of the same character as access by a court or passage. It is also important to notice that in *Newquay Urban Council* v. *Rickeard* (2) the justices had held that the premises did not obtain access through a court, passage, or otherwise; and Lord Alverstone said (3): "Therefore the question for the justices is whether these partly made or unmade roads are merely to give access to the houses or are themselves in process of becoming streets. In the latter case the decision under appeal will stand; in the former it must be reversed." That means that, in his view, if the approaches are themselves in process of becoming streets, then they are not within the words "or otherwise" in s. 10. If the access in the *Newquay Case* (2) was not through a court,

(1) [1911] 2 K. B. at p. 853. (2) [1911] 2 K. B. 846.
(3) [1911] 2 K. B. at p. 852.

1915

CHATTERTON v. GLANFORD RURAL COUNCIL.

passage, or otherwise, it seems to me a fortiori that if the approach is already a street it is not an access within the meaning of s. 10 of the Act of 1892.

Appeal allowed.

Solicitors for appellant: *A. Neal & Son, for A. Neal & Co., Sheffield.*

Solicitors for respondents: *Collyer-Bristow & Co., for Laverack, Son & Wray, Hull.*

J. E. A.

1915
July 30, 31.

THE KING *v.* THE SUPERINTENDENT OF ALBANY STREET POLICE STATION.

Alien—Nationality—Son born Abroad of Naturalized British Subject—Status of Son—Aliens Act, 1844 (7 & 8 *Vict. c.* 66), *s.* 6—*Naturalization Act*, 1870 (33 & 34 *Vict. c.* 14), *ss.* 4, 10—*British Nationality and Status of Aliens Act*, 1914 (4 & 5 *Geo.* 5, *c.* 17), *s.* 1.

A child born in a foreign State prior to the commencement of the British Nationality and Status of Aliens Act, 1914, did not obtain the status of British nationality by the mere fact that his father was a naturalized British subject.

RULE NISI for a writ of habeas corpus.

The applicant for the rule, Percy Carlebach, was born at Frankfort-on-the-Main, Germany, on September 5, 1884, and resided there with his parents until he was sixteen and a half years of age, when he removed with his parents to Brussels. He lived in Brussels for about seven years, when he left his parents and went to Berlin, where he was employed a little over a year in a bank. In October, 1909, he came to England, where he had since resided, and where he was employed as a clerk in the firm of Henry Carlebach & Co., who were members of the London Stock Exchange.

The applicant's father, Henry Carlebach, was by birth a German subject, but he was denationalized, and thereafter, namely, on May 24, 1869, he became a naturalized British subject. After the passing of the Naturalization Act, 1870, Henry Carlebach was, in pursuance of s. 7 of that Act, again

naturalized as a British subject on June 14, 1877. At that time Henry Carlebach was a member of the London Stock Exchange and he remained so till his death in 1908, although he had lived for some years in Germany and Belgium.

The applicant's birth was registered at the British Consulate at Frankfort; he had never served in the German army and had never been called upon to do, or to present himself for, military service in the German army. He had never made a declaration of alienage under s. 4 of the Naturalization Act, 1870.

After the outbreak of war between Great Britain and Germany the applicant registered himself as an alien enemy under the Aliens Restriction Order, being at the time under the impression that he had no nationality, and, having been born in Germany, did not wish to run the risk of incurring the penalties provided for in the said Order. He subsequently requested that his name should be removed from the register, but this was refused. Thereafter, having been interned at Albany Street police station as an alien enemy, he applied for and obtained this rule, contending that being the son of a British subject he was himself a British subject. The rule was directed to the superintendent of Albany Street police station, and notice of it was ordered to be given to His Majesty's Secretary of State for Home Affairs and the Commissioner of Police of the Metropolis.

G. A. H. Branson, for the Home Office and the police authorities, showed cause. At common law the child born in a foreign State of a natural-born British subject is not a British subject: see *Calvin's Case* (1); but by the British Nationality Act, 1730 (4 Geo. 2, c. 21), the children born out of the King's allegiance of a natural-born British subject were declared to be natural-born British subjects, and by the British Nationality Act, 1772 (13 Geo. 3, c. 21), the grandchildren born out of the King's allegiance of a natural-born British subject were declared to be natural-born British subjects. Apart from these Acts, which are limited in terms to the children and grandchildren of a natural-born British subject, nationality cannot be transmitted from parent to child. The privilege is the privilege of the children, not of the

(1) (1608) 7 Rep. 18a.

1915

REX v. ALBANY STREET POLICE STATION SUPERINTENDENT.

father: see *Fitch* v. *Weber* (1); *In re Bourgoise*. (2) The status of the applicant, who is the son born in Germany of a naturalized British subject, must depend upon the later Acts. Reliance is placed by him upon that part of s. 4 of the Naturalization Act, 1870, which provides that "Any person who is born out of [His] Majesty's dominions of a father being a British subject may, if of full age, and not under any disability, make a declaration of alienage in manner aforesaid, and from and after the making of such declaration shall cease to be a British subject." The words "British subject" there used mean a natural-born British subject, and the section merely enables his child who was born out of His Majesty's dominions, but who, as being the child of a natural-born British subject, is himself a natural-born British subject, to get rid of that status by making a declaration of alienage. This view is supported by s. 10 of the same Act, which provides as follows: "The following enactments shall be made with respect to the national status of women and children: . . . . (5.) Where the father, or the mother being a widow, has obtained a certificate of naturalization in the United Kingdom, every child of such father or mother who during infancy has become resident with such father or mother in any part of the United Kingdom, shall be deemed to be a naturalized British subject." Further, the definition of a natural-born British subject in s. 1 of the British Nationality and Status of Aliens Act, 1914 (3) (which

(1) (1847) 6 Hare, 51.

(2) (1889) 41 Ch. D. 310, at p. 320.

(3) British Nationality and Status of Aliens Act, 1914 (4 & 5 Geo. 5, c. 17), s. 1, sub-s. 1: "The following persons shall be deemed to be natural-born British subjects, namely:—

"(*a*) Any person born within His Majesty's dominions and allegiance; and

"(*b*) Any person born out of His Majesty's dominions, whose father was a British subject at the time of that person's birth and either was born within His Majesty's allegiance or was a person to whom a certificate of naturalization had been granted, ...

"Provided that the child of a British subject, whether that child was born before or after the passing of this Act, shall be deemed to have been born within His Majesty's allegiance if born in a place where by treaty, capitulation, grant, usage, sufferance, or other lawful means, His Majesty exercises jurisdiction over British subjects."

Sub-s. 3: "Nothing in this section shall, except as otherwise expressly provided, affect the status of any person born before the commencement of this Act."

came into operation on January 1, 1915), was altogether unnecessary if the applicant's argument is correct, nor was the proviso to sub-s. 1 required, for if the child born in a foreign country of a naturalized British subject is a natural-born British subject there was no necessity to enact that a child of a British subject born in a British protectorate prior to the commencement of the Act of 1914 should be deemed to have been born within His Majesty's allegiance. Moreover, sub-s. 3 of s. 1 of the Act also shows that in the case of the child of a naturalized British subject, born out of His Majesty's dominions, British nationality, which had never, at all events in terms, been previously conferred, is only conferred where the child is born after the commencement of the Act.

Compston, K.C., and *A. Cohn*, in support of the rule. By the common law the child of a British subject, wherever born, is a British subject: *Bacon* v. *Bacon*. (1)

[DARLING J. The English nationality of the child in that case, who was born in a foreign country, was based not upon the common law but on the statute 25 Edw. 3, stat. 2.

LUSH J. If the child born abroad of a British subject is himself a British subject it is difficult to see why the British Nationality Acts, 1730 and 1772, were required, and why they conferred the status of British nationality only on the children and grandchildren of the natural-born British subject.]

In any view he is a British subject by statute. By the British Nationality Act, 1730, the son of a natural-born British subject, though not actually a natural-born subject, is to be deemed to be so, and by the British Nationality Act, 1772, his son is to be deemed to be a natural-born British subject although he was not so in fact, and therefore when the Aliens Act, 1844, by s. 6 conferred upon a naturalized British subject the status of a natural-born British subject his son also is to be deemed a natural-born British subject. Sect. 6 of the Act of 1844, which enacted that "upon obtaining the certificate [of naturalization] and taking the oath hereinafter prescribed every alien now residing in, or who shall hereafter come to reside in, any part of Great Britain or Ireland, with intent to settle therein, shall enjoy all the rights

(1) (1640) Cro. Car. 601.

1915

REX v. ALBANY STREET POLICE STATION SUPERINTENDENT.

and capacities which a natural-born subject of the United Kingdom can enjoy or transmit, except that such alien shall not be capable of becoming of Her Majesty's Privy Council, nor a member of either House of Parliament, nor of enjoying such other rights and capacities, if any, as shall be specially excepted in and by the certificate to be granted in manner hereinafter mentioned," clearly put a naturalized subject on the same footing as a natural-born subject, leaving out the exception as to his capacity to be a Privy Councillor, &c., which is not material to the present case. Again, paragraph 3 of s. 7 of the Naturalization Act, 1870, has precisely the same effect, as it provides that "an alien to whom a certificate of naturalization is granted shall in the United Kingdom be entitled to all political and other rights, powers, and privileges, and be subject to all obligations, to which a natural-born British subject is entitled or subject in the United Kingdom," and then follows a qualification not material in this case. The rights conferred by those sections must include the right of a British subject to transmit British nationality to his child. Sect. 4 of the Naturalization Act, 1870, by providing that a person born out of the King's dominions of a father who is a British subject may, if of full age, and not under disability, make a declaration of alienage "and from and after the making of such declaration shall cease to be a British subject," clearly assumes that a person in the position of the applicant is a British subject, for how can a person who has never been a British subject cease to be one? The effect of the section is that a person who is the child born abroad of a naturalized British subject is himself a British subject.

[LUSH J. In Professor Oppenheim's International Law, 2nd ed., vol. i., pp. 382, 383, the opinion is expressed that children born abroad after the naturalization of their father are not British subjects.]

The late Professor Westlake took precisely the opposite view: see his Private International Law, 5th ed., pp. 385, 386, and his International Law, Part I., Peace, p. 235, n.

[LORD READING C.J. Mr. Dicey in his Conflict of Laws, 2nd ed., pp. 182, 183, refers to this point and expresses dissent from Professor Westlake's view.]

Mr. Dicey is referring more particularly to s. 7 of the Naturalization Act, 1870, and he ignores what is implied by s. 4 of the Act. Sect. 10, sub-s. 5, of the Act of 1870 supports the argument for the applicant, as it shows that not only is the father to whom a certificate of naturalization is granted made a British subject, but his infant children who come from the country of their birth and become resident in this country with him are to be deemed to be naturalized British subjects.

[LORD READING C.J. What effect do you give to the proviso to s. 1, sub-s. 1, of the British Nationality and Status of Aliens Act, 1914?]

Sub-s. 1 (*a*) having enacted that a person born within His Majesty's dominions and allegiance is to be deemed a natural-born British subject, and sub-s. 1 (*b*) having enacted that a person born out of His Majesty's dominions whose father was a British subject born either within His Majesty's allegiance or to whom a certificate of naturalization had been granted is to be deemed a natural-born British subject, it was thought necessary to explain what was meant by being born within His Majesty's allegiance, and it declared that birth within a British protectorate was to be deemed to be birth within His Majesty's allegiance. The proviso has therefore no bearing upon the case of the child of a naturalized subject.

[LUSH J. Is Mr. Branson not right in saying that the effect of sub-s. 3 of s. 1 is to restrict the operation of the Act to persons born after its commencement?]

No; the sub-section is an enlarging, not a restricting provision. Sect. 1, sub-s. 1 (*b*), confers British nationality only on the children born of a British father in a foreign State, whereas the British Nationality Act, 1772, conferred British nationality also upon the grandchildren born abroad of a British father. Sub-s. 3 preserves the status of those whose rights had accrued under the last mentioned Act. The British Nationality Acts, 1730 and 1772, are now repealed by the Act of 1914. [*De Geer* v. *Stone* (1); Cockburn's Nationality, pp. 8 and 9; and Hall's Foreign Jurisdiction of the British Crown, pp. 27, 28, were also referred to.]

(1) (1882) 22 Ch. D. 243.

1915

REX v. ALBANY STREET POLICE STATION SUPERINTENDENT.

LORD READING C.J. The Court granted a rule nisi calling upon the authorities to show cause why a writ of habeas corpus should not be issued to liberate the applicant who applied for the rule in order to test the right of the authorities to intern him, the authorities alleging that he is a German subject, or at any rate disputing his claim to be a British subject. The case has been argued before us entirely upon the proposition put forward by Mr. Compston that the applicant is a British subject.

His Lordship stated the facts and continued: The applicant is not a naturalized British subject, but it is said that he is to be placed in the same position as if he was the son of a natural-born British subject. The child born outside His Majesty's dominions of a natural-born British subject acquires, beyond all question, the status of a British subject. I think he does so by virtue of the British Nationality Act, 1730, but I am bound by the decision in *De Geer* v. *Stone* (1) to hold that he is a British subject. In that case Kay J. said at p. 253: "I must take the law to be that the grandchild born abroad, whose father was also born abroad, being respectively grandchild and child of a man who was by the common law a natural-born British subject, would be himself a natural-born British subject, but that his children, if born abroad, would be aliens." That was approved in the Court of Appeal and consequently I assume it to be the law. That, however, does not carry the applicant sufficiently far, because both the British Nationality Act, 1730, and the British Nationality Act, 1772 (which extended the privilege to the grandchild of a natural-born British subject), only apply in terms to the children or grandchildren of a person who is in fact a natural-born British subject. The applicant's rights must therefore depend upon the later Naturalization Acts.

The position being as I have stated with regard to the child of a natural-born British subject, Mr. Compston contends that the applicant's father, by virtue of the Naturalization Acts, acquired all the rights, powers, and privileges of, and was to be treated in all respects and for all purposes as, a natural-born British subject; that in fact after the passing of the Naturalization Acts there was no distinction between a natural-born British subject

(1) 22 Ch. D. 243.

1915

REX v. ALBANY STREET POLICE STATION SUPERINTENDENT.

Lord Reading C.J.

and a naturalized British subject for the purpose of determining the nationality of his children. To decide whether that argument is sound or not we must examine the statutes very closely. One can imagine the Legislature, while quite prepared to extend the rights of a naturalized British subject and also prepared to make it easier for an alien to become naturalized, not being prepared to give to the descendants of naturalized subjects, if those descendants were born outside His Majesty's dominions, the same rights as it was giving to descendants born outside His Majesty's dominions of a father who was in fact a natural-born British subject. Whether Parliament did so intend or not must be determined by the language it has used.

We were referred to the Aliens Act, 1844, s. 6 of which provides that, subject to certain conditions, an alien who shall have obtained a certificate and have taken the oath and shall come to reside in any part of Great Britain or Ireland, with intent to settle therein, "shall enjoy all the rights and capacities which a natural-born subject of the United Kingdom can enjoy or transmit." It is to be observed that those rights and capacities are granted to the person obtaining the certificate; there is certainly nothing in the section which confers upon the son the same rights as are conferred upon the father upon the latter becoming a naturalized British subject. An argument was based upon the word "transmit" which is used in s. 6, but one must bear in mind that the words are "shall enjoy all the rights and capacities which a natural-born subject of the United Kingdom can enjoy or transmit." The son does not really acquire his status by reason of his descent. In the ordinary course he acquires it by reason of the allegiance which he owes to the King from the moment of his birth within the United Kingdom. The extension of the right to those who are born of natural-born subjects outside the dominions of the King was created by statute. I am inclined to the view, although it is not necessary to determine it in this case, that *Bacon* v. *Bacon* (1) and the statute 25 Edw. 3, stat. 2, show that such children were not English subjects by the common law; I agree with the passage at pp. 8 and 9 of Lord Chief Justice Cockburn's work on

(1) Cro. Car. 601.

1915

REX v. ALBANY STREET POLICE STATION SUPERINTENDENT.

Lord Reading C.J.

Nationality that the statute 25 Edw. 3, stat. 2, was not declaratory of the common law, but was enacting new law.

If the Aliens Act, 1844, has not granted British nationality to the applicant, it seems to me that the Naturalization Act, 1870, has not done so. The applicant's father obtained his certificate under the Act of 1870 in 1877, although the taking out of that certificate did not in any way diminish the rights which he had obtained in 1869 by virtue of the Aliens Act, 1844; but there is nothing in the Act of 1870 which in terms confers upon the child of a naturalized British subject, where such child is born outside the King's dominions, the status of a British subject. Reliance was placed upon the latter part of s. 4 of the Act of 1870. The substance of Mr. Compston's argument was this, that the words in that part of s. 4 where reference is made to a British subject are sufficiently wide to cover the case of a naturalized British subject, and as it provides that a person "who is born out of [His] Majesty's dominions of a father being a British subject may, if of full age, and not under any disability, make a declaration of alienage . . . . and from and after the making of such declaration shall cease to be a British subject," it is asked how can a person cease to be a British subject if he never has been one? That, it is said, implies that the child born abroad of a naturalized British subject is a British subject unless and until he makes such a declaration of alienage. In this case no such declaration was made by the applicant. The word "cease" in the section does create some difficulty, but the difficulty is not insuperable, and this important consideration must not be lost sight of, namely, that the portion of s. 4 upon which reliance is placed did not make a person a British subject who was not one already; it was not conferring the right of nationality, but was merely giving to a person who was a British subject the right to cast off British nationality and to make a declaration of allegiance to another State. In order to succeed in his contention the applicant must find in some other provision the right which he claims to possess, and the only other section which is said to confer the right is s. 6 of the Aliens Act, 1844, but in my opinion that section does not go as far as Mr. Compston contends. No other section in the Act of 1870 confers the right

claimed. Reference was made to sub-s. 3 of s. 7 of that Act, which confers very extended rights on a person to whom a certificate of naturalization has been granted, but the same observations apply to that sub-section as I have already made on s. 6 of the Aliens Act, 1844. Sect. 7, sub-s. 3, deals with the rights of the person to whom the certificate of naturalization is granted, and does not deal with the rights of his children.

Coming now to the British Nationality and Status of Aliens Act, 1914, I was impressed by, and indeed I can see no answer to, the argument based by Mr. Branson upon s. 1. The Act of 1914 is one to "consolidate and amend the enactments relating to British nationality and the status of aliens"; it repeals the previous statutes, but it preserves the status of a person acquired under the repealed Acts, and it states the law applicable in the future. The applicant's contention would lead to this, that the child of a British subject born in dominions over which His Majesty exercises a protectorate was in a worse position before the passing of the Act of 1914 than a child born say in Germany of a father who had become a naturalized British subject. The Legislature might possibly so enact, but we should require to be convinced on the language used before we could come to such a conclusion. It seems an absurdity to suppose that a child born in Germany of a naturalized British subject should acquire the rights of, and be, a British subject, whereas the child born in one of His Majesty's protectorates of a British father should never, prior to the passing of this Act, have acquired such rights. I cannot think that that was the law, but it must have been, if Mr. Compston's argument is right. The proviso to s. 1, sub-s. 1, which is retrospective, says that "the child of a British subject, whether that child was born before or after the passing of this Act, shall be deemed to have been born within His Majesty's allegiance if born in a place where by treaty, capitulation, grant, usage, sufferance, or other lawful means, His Majesty exercises jurisdiction over British subjects." That proviso would have been quite unnecessary, certainly as regards its retrospective effect, if the applicant's contention is right, because sub-s. 3 of s. 1 preserves the status of any person born before the commencement of the Act. Therefore if a person born outside the King's

1915

REX v. ALBANY STREET POLICE STATION SUPERINTENDENT.

Lord Reading C.J.

dominions in a protectorate already had the status of British nationality it would have been quite unnecessary to enact the proviso and give it a retrospective effect.

On a consideration of these various enactments, I come to the conclusion that Parliament did not intend that the children of a person who was given the status of a British subject by virtue of naturalization should be placed in all respects in the same position as the children of a natural-born British subject, and having come to that conclusion it follows that this rule must be discharged.

DARLING J. I am of the same opinion. The question is one of great difficulty in view of the number of statutes that have to be considered, and in view of the divergent views expressed by authorities such as Mr. Dicey and the late Professor Westlake on matters essential to the decision of this point. It may be impossible to reconcile all the expressions used in a series of statutes, beginning with 25 Edw. 3, stat. 2, and including 7 Anne, c. 5, the British Nationality Acts, 1730 and 1772, and the Aliens Act, 1844, before we arrive at the state of things created by the Naturalization Act, 1870, but from a consideration of these statutes and the authorities I think it appears quite plainly that the son of a natural-born British father was not by the common law himself a natural-born British subject if he was born outside the King's dominions. In the time of Edward III. it was open to doubt whether even the King's sons, if born, as they might well have been, in a place where our King held feudally under another King—as for instance in the Duchies of Guienne, Aquitaine, or Normandy, or in the county of Anjou—were English subjects and entitled to inherit land in England; and a statute had to be passed—25 Edw. 3, stat. 2—which enacted that the King's sons always had been entitled to inherit land in England, but that with regard to the sons of natural-born English fathers, if born abroad, they were only from that date to be English subjects and so capable of inheriting land. It is said that the applicant, who was born of a naturalized British subject, is himself a natural-born British subject although he was born in Frankfort, a town in a foreign

State. I cannot agree that certain vague words used in s. 4 of the Naturalization Act, 1870, as to how a man may cease to be a British subject make of him a British subject. Those words in s. 4 were not, I think, meant to confer upon him the status of a natural-born British subject; they are merely pointing out how, if a person is really a British subject, he may get rid of that status. There was a time during the development of England when it was to the interest of the State to insist upon as many people being British subjects as it conveniently could, but as the dominions of the Crown increased and as they were widely scattered over the world, there came a period when it seemed the interest of the State not to claim more subjects, but rather to indicate to many of its subjects how they might get rid of their nationality and so free this country from the burden of protecting them. Many of those people, moreover, were not of English type at all, and by 1870 I think the State thought it was convenient to be rid of them, hence s. 4 of the Naturalization Act, 1870. So the matter remained. This applicant was, as I have said, born in Frankfort, the son of a German who had been since 1869 a naturalized British subject and had also taken out a certificate of naturalization under the Act of 1870. What was the position of the son, the applicant? Mr. Compston says that the applicant is a natural-born British subject although he was born outside His Majesty's dominions. The British Nationality and Status of Aliens Act, 1914, seems to me to throw great light upon the view of the Legislature as to who previously were natural-born British subjects, and it defines in some respects who, since the passing of that Act, is to be deemed to be a natural-born British subject. Sect. 1, sub-s. 1, says that "the following persons shall be deemed to be natural-born British subjects, namely:—(*a*) Any person born within His Majesty's dominions and allegiance." The applicant is not a natural-born British subject within that definition. Then comes clause (*b*): "Any person born out of His Majesty's dominions, whose father was a British subject at the time of that person's birth and either was born within His Majesty's allegiance or was a person to whom a certificate of naturalization had been granted." The applicant was the son of a person to whom a certificate of

1915

REX v. ALBANY STREET POLICE STATION SUPERINTENDENT.

Darling J.

naturalization had been granted; he was born at Frankfort; and it is said that he is a natural-born British subject simply by the fact that his father obtained a certificate of naturalization. If that contention is sound, a fortiori the son of a father who himself was a natural-born British subject would be a natural-born British subject if born in a British protectorate. I find it impossible to think that a person born in Frankfort of a naturalized British subject would be himself a natural-born British subject, but that if born in a British protectorate instead of in Frankfort he would not be a natural-born British subject. I think the Legislature was of opinion that a person born in Frankfort in those circumstances would not be a natural-born British subject. According to Mr. Compston's argument the applicant would be a natural-born British subject if he was born in Frankfort, but if he was born say in Bechuanaland he would not be a natural-born British subject. That follows from the proviso to sub-s. 1 of s. 1 of the Act of 1914. His Majesty exercises no jurisdiction over British subjects in Frankfort; he does exercise jurisdiction over British subjects in Bechuanaland. To show how extravagant is this claim on behalf of the applicant, let us suppose that a person had been born in Hanover. Hanover was once a place where the King of this country exercised jurisdiction. That jurisdiction is now gone, but the argument requires us to hold that a person born in Hanover of a British father is himself a natural-born British subject, whereas if he had been born in Bechuanaland or in any other British protectorate he would not, but for this proviso in the Act of 1914, be a natural-born British subject. I can find nothing in the statutes or in the authorities to compel us to hold that he is a natural-born British subject, when we should have to hold that the son of a natural-born British subject, say of a colonel in His Majesty's Army serving in a British protectorate, would, but for this proviso, be an alien if he was born in that protectorate. For the reasons I have given I agree that the rule should be discharged.

LUSH J. I agree. It is important, in dealing with the question of nationality, to bear in mind that the status of British

nationality is a status which must be acquired by or conferred upon the individual himself. It is not a status which can be transmitted to him by his parent. We have therefore to see whether the applicant has acquired this status either by the common law or under the provisions of some statute. I think it is clear that he did not acquire it by the common law because he was not born within His Majesty's dominions and allegiance. Then has any statute conferred this status upon him? It is quite clear that he is not within the terms of the British Nationality Act, 1730, or the British Nationality Act, 1772, because those two statutes relate only to the children and grandchildren of natural-born British subjects. Then came the Aliens Act, 1844, the only relevant section of which is s. 6, which says that a naturalized person shall enjoy all those rights which a natural-born British subject can enjoy or transmit. I have already said that this status is not a thing that can be transmitted. The section does not say what the natural-born British subject can transmit, but it seems to me that it is referring to property, dignities, and things of that kind which can be transmitted from father to son. We now come to the Naturalization Act, 1870, and it is upon that Mr. Compston relies. Only two sections in that Act deal with children, ss. 4 and 10. Sect. 4 is not a section which purports to confer a status upon any one; it only provides machinery by which a person who is a British subject can denationalize himself. It throws no light upon this question. The other section—s. 10, sub-s. 5—does not purport to confer any status upon a person in the position of the applicant, and the only inference to be drawn from it is that if the children referred to are born after the father is naturalized they do not acquire the status of British nationality, because the subsection only confers it upon children in certain conditions, which conditions have not in fact been fulfilled in the present case. As I can find nothing in the Act of 1844 or in that of 1870 which confers any status upon the child of a naturalized person when that child has been born in a foreign country, I cannot see whence the status claimed by the applicant is acquired. But if one is in any doubt upon the point that doubt is dispelled by the provisions of the British Nationality and Status of Aliens Act, 1914. Sect. 1

1915

REX v. ALBANY STREET POLICE STATION SUPERINTENDENT.

Lush J.

does not apply to a person born before the commencement of the Act so as to affect his status: see sub-s. 3; sub-s. 1 (*b*), which speaks about children of British subjects, does not apply to the present applicant because the status of the applicant, whatever it may be, was acquired prior to the Act, and therefore he does not come within sub-s. 1 (*b*), but one finds a very striking proviso which deals in this way with children of British subjects born before the passing of the Act: it says that if a child is born in certain places—dominions or protectorates—he shall have a certain status. It excludes a person born outside the British dominions or protectorates because it only includes those born within them. From that proviso it is impossible to draw any other inference than that the Legislature recognized that at that time the child of a naturalized subject who was born in a foreign country was not a person who had become a British subject. I agree that the rule must be discharged.

Rule discharged.

Solicitors for applicant: *Cruesemann & Rouse.*
Solicitor for respondents: *Treasury Solicitor.*

J. S. H.

LEMY, APPELLANT *v.* WATSON AND ANOTHER, RESPONDENTS. 1915

July 27, 28.

Merchandise Marks—False Trade Description—"Lawfully and generally applied"—"Norwegian Sardines"—Merchandise Marks Act, 1887 (50 & 51 *Vict. c.* 28), *s.* 2, *sub-s.* 2; *s.* 18.

The Merchandise Marks Act, 1887, s. 2, sub-s. 2, makes it an offence to sell goods to which a false trade description is applied. Sect. 18 provides that where, at the passing of the Act, a trade description was "lawfully and generally applied" to goods of a particular class, or manufactured by a particular method, the provisions of the Act with regard to false trade descriptions shall not apply to such trade description so applied.

At the time of the passing of the Act of 1887 there was a trade in England in the sale of small fish, prepared in oil and packed in tins, under the description of "Norwegian sardines." Sardine is the French name for the pilchard. The persons engaged in the trade knew, but the purchasing public did not know, that the fish sold under the above description were not sardines, but were brisling, a Norwegian fish similar to the sprat. The respondents having sold in 1912 brisling prepared in the above manner under the description of "Norwegian sardines" were charged with an offence under s. 2, sub-s. 2, of the Act, and by way of defence relied on s. 18 of the Act:—

Held, that a trade description was not "lawfully" applied to goods within s. 18 if its use, although not involving the commission of a criminal offence, tended to mislead the public; that a trade description was not "generally" applied unless it was a conventional term in general use, not only by the persons engaged in the particular trade, but by the public at large; that the description "Norwegian sardines" was neither "lawfully" nor "generally" applied at the time of the passing of the Act of 1887 to brisling prepared in oil and sold in tins; and that the respondents were, therefore, guilty of the offence charged.

SPECIAL CASE stated by the Court of Quarter Sessions of the county of London.

Watson and Saint, the respondents, were convicted by and before Sir John Dickinson, Chief Magistrate of the Metropolitan Police Courts, on March 20, 1914, for that they did on December 13, 1912, unlawfully sell certain goods, to wit, fish in oil packed in tins, to which goods there was then a certain false trade description applied, namely, "sardines," contrary to s. 2, sub-s. 2, of the Merchandise Marks Act, 1887. (1)

(1) Merchandise Marks Act, 1887 (50 & 51 Vict. c. 28), s. 2: "(2.) Every person who sells, ... any goods or things to which any . . . . false

1915

LEMY v. WATSON.

The respondents appealed to quarter sessions against the conviction. The appeal was heard by the deputy-chairman and one other justice. After hearing the evidence and the arguments of counsel they gave judgment in the appeal, quashing the conviction, subject to the opinion of the King's Bench Division of the High Court of Justice on this case.

The respondents traded as Angus Watson & Co. at Newcastle-upon-Tyne. At the request of the appellant, on December 13, 1912, one Lauter ordered by letter of the respondents a case of "skipper" sardines at the price of 1*l.* 16*s.* 10*d.* The goods were sold by the respondents to Lauter at his address in Clark's Buildings, High Street, Bloomsbury, and an invoice, in which the goods were described as "skipper sardines," was sent accompanying the goods.

Before the prosecution of the respondents at Bow Street, they had been proceeded against at the Guildhall Justice Room in the city of London upon a summons charging a similar offence before Sir George Woodman, Alderman, who decided that the

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trade description is applied, ... shall, unless he proves—

. . . . . .

"(*c*) that otherwise he had acted innocently;

be guilty of an offence against this Act."

Sect. 3: "(1.) For the purposes of this Act—

. . . . . .

"The expression 'trade description' means any description, statement, or other indication, direct or indirect,

. . . . . .

"(*d*) as to the material of which any goods are composed . . . ."

Sect. 18: "Where, at the passing of this Act, a trade description is lawfully and generally applied to goods of a particular class, or manufactured by a particular method, to indicate the particular class or method of manufacture of such goods, the provisions of this Act with respect to false trade descriptions shall not apply to such trade description when so applied: Provided that where such trade description includes the name of a place or country, and is calculated to mislead as to the place or country where the goods to which it is applied were actually made or produced, and the goods are not actually made or produced in that place or country, this section shall not apply unless there is added to the trade description, immediately before or after the name of that place or country, in an equally conspicuous manner, with that name, the name of the place or country in which the goods were actually made or produced, with a statement that they were made or produced there."

respondents had given a false trade description, but that in so doing they had acted innocently.

After hearing a considerable amount of evidence led by both parties to the appeal, the Court of quarter sessions took time to consider its judgment, which was delivered on July 24, 1914. In view of the importance of the appeal and of the various legal contentions raised by the parties thereto the Court of quarter sessions thought it right to put its judgment into writing and therein to deal fully with the facts proved and legal contentions raised before it. A print of such judgment was accordingly annexed to, and was to be taken to be a part of, this case, as sufficiently showing the facts and the conclusions of law.

The Court of quarter sessions held, first, that the description "Norwegian sardines" applied to the brisling packed in oil in the respondents' tins was a trade description as to the material of which the respondents' goods were composed within the meaning of s. 3, sub-s. 1 (*d*), of the Merchandise Marks Act, 1887, and, secondly, that s. 18 of the Act provided upon the facts and for the reasons set forth in the judgment a defence for the respondents to the charge on which they had been convicted.

If the King's Bench Division of the High Court of Justice should be of opinion that upon the facts set forth in the judgment the Court correctly determined the second question of law raised before it, and therein referred to, the order allowing the appeal of the respondents and quashing the conviction was to stand. If the Court should be of opinion that the Court of quarter sessions did not correctly determine the first question of law the order allowing the appeal was to stand. If the Court should be of opinion that the decision was right on the first question of law but wrong on the second question of law, the order allowing the appeal was to be quashed, and an order dismissing the appeal and affirming the conviction of the respondents was to be made.

The judgment of the deputy-chairman was as follows:—

This is an appeal by Angus Watson and Henry Bell Saint, trading as Angus Watson & Co., against their conviction by Sir John Dickinson, on March 20, 1914, for having sold goods to which a false trade description was applied—a fine of 20*l.*

1915

LEMY v. WATSON.

being imposed upon each, and a further order made that each should pay 100 guineas costs.

The appellants (1), in December, 1912, sold to one Jack Lauter a quantity of goods which were proved to be Norwegian brisling in oil. The goods were ordered as "skipper sardines"—they were invoiced as "skipper sardines"; the transparent paper covering on the tin bore the words "Norwegian skipper sardines, packed in virgin olive oil," and a paper seal was attached to this covering bearing the words "skipper sardines." The tins in which the goods were packed were marked "Norwegian skipper sardines in pure olive oil, packed in Norway with delicious spicing." The question which we have to decide is as to whether or not the conviction is right. There is no good purpose to be served in keeping the parties in suspense, so I may say at once that this appeal will be allowed and the conviction quashed.

I should prefer, if such a course were proper, to say no more, but, unfortunately, there are two reasons which make it my duty to give at some length the grounds on which this decision is arrived at.

In the first place it may be a final decision, and therefore those interested in this trade have a right to know for their future guidance the exact position in which they stand.

More probably, however, this case will go to a higher tribunal, and with that in view I think it desirable to deal in some detail with the case, and so far as possible to make it clear what are the findings of fact and what are the deductions of law. In these cases of questions of mixed law and fact this is often a task not so simple as it appears. This has necessitated on some points alternative findings and deductions, or perhaps it would be more accurate to say additional findings and deductions, though I shall try to indicate clearly my own views of the law, in which Mr. Jeffrey concurs. These additional findings have been introduced in the hope that should it be desired to carry the case

(1) In the judgment of the deputy-chairman the words "appellants" and "respondent" refer to the position of the parties at quarter sessions. The respondent at quarter sessions became the appellant in the King's Bench Division and vice versa.

further no necessity will arise for sending the case back to us for further consideration on questions of fact.

It has been argued that the case for the respondent fails ab initio on the ground that he has failed to show precisely what a sardine is, and, therefore, cannot prove that a brisling is not a sardine. It is true that the onus is upon the respondent to show that a brisling is not a sardine, and it is also true that his witnesses do not agree as to the use, in England, of the word sardine, and that they have failed to give a definition of the word as anglicized. But without a definition of the word and without a clear view of what a sardine is, it is still possible to show that a particular article is not a sardine. And that onus, we think, has been discharged as I shall now explain. The word "sardine," though apparently not originating in France—and I have looked up a Greek lexicon (1)—was introduced into this country from France. In France the word is used to denote a particular fish, mature or immature, large or small, alive or dead, in the sea or out of it, at liberty or captured. It is the precise French equivalent of the English pilchard. On the introduction of the word "sardine" into the English language, the word, with insignificant exceptions, was not used in some of the senses which it commonly has in France. Some Cornishmen and a few Irishmen may have used the word as referring to a live fish in the sea, but the popular use has been confined throughout to a dead fish of small size processed in one of a variety of ways, the most common being when processed in oil in tins. But while the expression in England has never completely covered the ground which the word covers in France, there is no evidence to show that the ordinary meaning, as distinct from any trade meaning, has ever been extended in this country. Until recently, however, very few people knew that the sardine is in fact a pilchard, and most people in talking of sardines had the process of manufacture uppermost in their minds rather than the scientific individuality of the fish. The sprat or brisling, the herring, and the various other fish mentioned in the course of the case, are all distinct from the pilchard, and the name "sardine" as applied to any of them is inaccurate, is a misnomer, and is therefore an untrue or false description.

(1) [It goes back to Galen.]

1915

LEMY v. WATSON.

The next question which arises is as to whether a false trade description has been used; and that depends upon the construction to be placed upon s. 3, sub-s. 1 (*d*), of the Act, the false description alleged in this case being a false description "as to the material of which the goods are composed." It has been urged on behalf of the appellants that "sardine" is not a material, and that the material of which the goods are composed was flesh, and that there has been no description, and therefore no trade description, of any material composing the goods. The meaning of "material" seems to us to be the substance out of which a thing is made; the word is more often used perhaps in the plural than in the singular, and the materials used in this case seem to us to be the brisling, olive oil, and spices; or, to put it in language familiarized by a great political and economic controversy, the brisling is the raw material of the Norwegian sardine industry. For that reason we cannot agree with Mr. Walter that the provisions of this Act do not apply, and we hold that a trade description, false in fact as to a part at any rate of that description, has been applied.

The next question that arises is whether that trade description is false in law. It has been strongly urged that the name "sardine" has within the last ten years been popularly and almost universally used by traders and the public for fish other than the pilchard, and that in consequence the description cannot be said to be a false description at the time when this offence was committed. It seems to us, however, that if the trade description was false in the year 1883 or 1887, the fact that everybody has since accepted it, even if proved, makes no difference to the falsity of the description, and having come to the conclusion that the description was, in fact, false when first introduced, we are satisfied that the description is as false to-day. The word "false" in this Act is, we think, equivalent to "untrue" and does not import untrue to the knowledge of the person applying the description. Sect. 2, sub-s. 2 (*a*), seems to prove that proposition. That sub-section is a defence to a prosecution but does not affect the falsity of the description. Further, a description which is true scientifically may be false as a trade description, but, with an exception with which I am about to

deal, we cannot hold that a description (not applied in or before 1887) can be otherwise than a false trade description if it is false in fact. This view might appear to be contrary to the view of Wills J. in *Fowler* v. *Cripps* (1): "The fact that a description as applied to particular goods is scientifically correct will not prevent it from being a false trade description; and the converse is equally true." That statement is one which, had it been necessary for the purpose of deciding that case, would undoubtedly have been binding upon us, but apart from the fact that it is in the nature of an obiter dictum, the explanation in that judgment which immediately follows modifies that last statement—that "the converse is equally true." The learned judge goes on: "Many trade terms are of very old standing, and it may be that with the advance of science some of them will become scientifically incorrect, but proof of that incorrectness will not cause them to be false trade descriptions if they continue to be understood in the trade as indicating the same substances which they did when those terms first came into use." That passage, in our view, means that a description scientifically incorrect may be a proper trade description if, when first applied, it was believed to be true and that thereafter the old application might be continued even when science had discovered that it was in fact false. To that extent it may be an extension of the provisions of s. 18 of the Act, but as a general principle we are satisfied that a trade description which is in fact untrue must not be applied unless it had been applied previous to August, 1887. In any case we find that science had discovered that the sprat and the sardine were different fish before the term Norwegian sardine came into use.

I now turn to what is the main consideration in this case—the meaning and interpretation of s. 18, and I must now read and consider that section so far as applicable: "Where, at the passing of this Act, a trade description is lawfully and generally applied to goods of a particular class, or manufactured by a particular method, to indicate the particular class or method of manufacture of such goods, the provisions of this Act with respect to false trade description shall not apply to such trade description

(1) [1906] 1 K. B. 16, at p. 21.

1915

LEMY v. WATSON.

when so applied." The subsequent part of the section deals with false trade descriptions such as one which has been very frequently mentioned in this case, "Brussels carpet," and provides that for the future, to give an example or two, if the name of the country in a description is calculated to mislead, French beans are to be labelled "grown in Kent," Yorkshire pudding as "made in Germany," or German sausage as "manufactured in Chicago" —see s. 3, sub-s. 1 (*d*). The former portion of the section, however, deals with false descriptions whose falsity is more frequently other than in the name of the place or country—s. 3, sub-s. 1 (*a*), (*b*), (*c*), and (*e*). The important words about which the chief difficulty arises are the words "lawfully and generally applied." This application must be to goods of a particular class or to goods manufactured by a particular method, and it must be for the purpose of indicating, in the first case, the particular class, and in the second, the particular method of manufacture.

Has the trade description in this case been lawfully applied, if applied prior to August, 1887? The contention of the respondent is that no description which is in fact untrue could ever be lawfully applied. If that were so it seems to us that s. 18 would then have been omitted, because the Act only punishes false trade descriptions, i.e., trade descriptions which are untrue in fact or (e.g., in *Fowler* v. *Cripps* (1)) false by reason of established trade usage, and that section, that is, s. 18, could then have no application because no false description could ever be lawfully applied. It was further contended that no description could be lawfully applied unless it could be shown that no civil action would lie on a sale of the goods. That would, in such a case as this, necessitate a prolonged hearing on insufficient evidence of a hypothetical or imaginary action (or possibly a series of hypothetical actions) supposed to have been brought more than a quarter of a century ago. This cannot have been intended by the Legislature.

It was contended on behalf of the appellants that previous to 1887 a description could be lawfully applied so long as the person applying it could not have been convicted under the provisions of the criminal law either of obtaining money by false pretences

(1) [1906] 1 K. B. 16.

or as a common law cheat, and with that view we are in agreement. During the hearing of the evidence and of the arguments I am afraid that I did not fully appreciate the point with which I now desire to deal, and if I may say so without offence the learned counsel seemed at times to be in the same position. The prosecution appeared to contend that the meaning of "lawfully and generally applied" is "almost universally used in a way supported by law"; the appellants, that it meant "popularly used in a way not prohibited by the criminal law." I hope I am not unfairly paraphrasing the rival contentions.

I desire to point out that the word in the statute is "applied" and not "used." It is an expression which constantly occurs throughout the Act both in the verb "apply" and the noun "application." We have come to the conclusion that "apply" means what it says and its meaning is explained by s. 5. It must be an "application" within the meaning of that section, and not a "use" in some other way. From this we conclude that the question of whether the term was popularly used or understood does not affect the matter. It is the application of a trade description which is the issue and nothing else. It is true, nevertheless, that the Act was passed for the purpose of protecting the public, and ensuring that they should get the articles demanded and expected. But the method by which that purpose was carried out and that object sought to be attained was by insisting on scrupulous accuracy in the trade descriptions applied to the goods.

Now, prior to 1887, the sales of sprats and the application to them of the word "sardine" by Frenchmen might well be fraudulent, because the seller knew the meaning of the word sardine in France and knew that the fish he was tinning were not sardines. The same might be said of sales from Portugal and Spain, and there is evidence which leads us to believe that some, at least, of the sales of Chancerelle at Deal were also fraudulent; but there were Edgar and Faucheaux at Deal, and there were firms in Ireland at Youghal and in the Garvie industry in Scotland, who carried through many sales of so-called "sardines," which were lawful as the evidence shows, at any rate, in the sense that they would not have rendered the

1915

LEMY v. WATSON

seller liable to prosecution. If the sales were lawful at that time, the application of the trade description was lawful also, because if a sale was not an obtaining under false pretences, the application of a false description would not have been even an attempt so to obtain, and if there was no legal offence in the sale there would be none in the application of the description.

Under these circumstances we are satisfied that previous to the passing of the Act trade descriptions of which "sardine" was a part were lawfully applied in those cases, whether the word "applied" is used in its strict interpretation, or whether it be interpreted as "used."

With regard to the word "generally" this is a word of many different meanings, and for that reason I think it well to set out certain findings of fact on this point. The following findings of fact seem to cover the ground sufficiently to enable the higher tribunal of which I have spoken to decide the case, whatever may be the proper interpretation of the word "generally." These are the findings.

The Norwegian brisling were processed as sardines, labelled as Norwegian sardines or smoked sardines, and put upon the English market in 1884, or earlier. The brisling was never labelled for or in the English trade except with the word sardine forming part of the description. It was known by all traders who dealt in it under that description. The traders who dealt in it were chiefly in the North of England in those early years. Those in the trade who dealt in it knew that it was different from the French manufacture. The purchasing public were unaware that the fish was different from the French sardine. Previous to 1887 the sales in this country were very small. I have put in the word "very" out of deference to my colleague, Mr. Jeffrey, but we hold that they were very small, especially when compared with the French trade of that time or the Norwegian trade to-day, nor was the trade in Irish, Scotch, or Deal sprats, processed and described as sardines, a large one.

I now desire to apply the law to those findings of facts Were it not for the conjunction with the word "lawfully" we should have held that the word "generally" meant "in a general way," and that it referred to an application made to

any one of the various articles comprising the particular class for the purposes mentioned in the section. But the conjunction with the word "lawfully" makes such a construction difficult, though if that be the true interpretation we have no doubt that the description was generally applied. The other interpretations suggested are: (1.) almost universally, and (2.) popularly or usually. Again I may point out that the word is "applied" and not "used," and if that word is to be interpreted strictly it is a matter of no importance which of these two interpretations is the correct one; because no term other than sardine was ever used in this country to indicate the sprat suitably processed and tinned in oil, though always with a prefix. Without deciding any question of herrings, mackerel, chinchards and other fish, about which the evidence is very conflicting and far from complete, we have come to the conclusion that sprats processed à la sardine had been labelled and sold in this country previous to 1887 in considerable quantities, and that "sardine" invariably formed a portion of the description given to them. The "considerable quantities" to which I there refer are not a contradiction of the finding before, that the sardine trade was very small, because of course the Irish and Deal trade are also introduced into this portion. Further, we find that no other name was given to them by the trade. We consider that "usually" is the correct interpretation of the word "generally," but whichever of these interpretations be correct, we find that "sardine" as part of the title was generally applied to those goods. The particular class to which it was applied was the sprat, suitably processed and tinned. The particular method of manufacture was a method similar to that adopted by the French packers of pilchards, the differences in the process being due, in the main, to the differences in the various climates where the goods were prepared. Now, was this "lawful and general application" to goods of the sprat class manufactured by this method used to indicate the particular class or method of manufacture? With regard to the word "sardine" simpliciter, it did not indicate a particular class, but it was used to indicate goods manufactured by a particular method to indicate that particular method; and as I said before, it did indicate the method uppermost in the minds

1915

LEMY v. WATSON.

of the public when purchasing sardines. It is necessary, however, to point out that the word "sardine" simpliciter has never been generally used in the Norwegian trade; the sprat prepared by this method has had either the local prefix or the name of a particular brand and almost invariably both.

It, therefore, seems to us that the provisions of s. 18, while permitting the continued use of the word "sardine" as a portion of the trade description of sprats processed as these are, would not permit its use without the qualifying words used previous to the passing of the Act.

Our view, therefore, is that had sardine been used simpliciter for the tinned sprat previous to August, 1887, that term could legally have been applied to-day, but that "Norwegian sardine" having been the description used at that date for the fish with which we are concerned, "Norwegian sardine" is the description which now must be adhered to.

But on the assumption that I am wrong in holding that sardine simpliciter could have been applied without infringing the provisions of the statute if it had been previously used simpliciter, I desire to deal for a moment with the trade description "Norwegian sardine" which, in our view, is the trade description which has been used in this case. There is, of course, no such thing as a "Norwegian sardine" proper, with the exception of two specimens in the Norwegian museum, but the evidence is conclusive that for many years previous to 1887, and ever since then, these fish have been labelled in Norway, shipped from Norway, and sold in England as "Norwegian sardines," and by no other name. The brisling is the nearest approach to the sardine which the Norwegian seas provide, and even if sardine could not have been legally used as a trade term, the term Norwegian sardine could be so used and applied.

Under these circumstances we hold that the description "Norwegian sardine" while false in fact is not false in law.

One other point arises. The description "skipper sardines" appears in the invoice and on the paper seal without the word "Norwegian." Believing that the appellants are not entitled to use the word "sardine" simpliciter or even "skipper

sardine," as those were not trade descriptions applied in 1887, this would appear to be an infringement of the Act. But I desire to point out that "skipper sardines" were a well-known brand at the date of purchase, and that they were specifically asked for; that the paper seal does not disguise or hide the word "Norwegian" several times imprinted on the paper covering and tin, and we are satisfied that the appellants had no intention of concealing the fact that these were "Norwegian sardines."

Under these circumstances, if a technical offence with regard to these two descriptions has in fact been committed, we hold that s. 2, sub-s. 2 (*c*), would exonerate the appellants, because in this omission they acted innocently, although this defence would not avail them in the event of similar omissions in the future.

For these reasons the appeal will be allowed and the conviction quashed.

Sir R. B. Finlay, K.C. (*Kerly, K.C.*, and *Bodkin* with him), for the appellant. It has been found as a fact that the sardine is a pilchard. The fish sold by the respondents is not a pilchard but a brisling, which is the same thing as a sprat. The use of the words "skipper sardines" in the invoice and on the label attached to the tin without the addition of the word "Norwegian" was clearly a false description, and the respondents cannot rely on s. 18 of the Merchandise Marks Act, 1887, as a protection for that false description, because the case finds that the description skipper sardines without the word Norwegian had not before 1887 been either lawfully or generally or at all applied to brisling prepared in oil. Quarter sessions held that if a technical offence had been committed by the use of this description in the invoice and on the label, the respondents were exonerated under s. 2, sub-s. 2 (*c*), because they had acted innocently. There was no evidence that the respondents had acted innocently. The evidence was all the other way, for it had been proved in the previous prosecution in 1912 that the brisling is not the same fish as the sardine.

With regard to the use of the description "Norwegian skipper

1915

LEMY v. WATSON.

sardines," that is admittedly a false description, but the respondents rely on s. 18 as a defence. The effect of that section is that if before 1887 a trade description had been "lawfully and generally applied" to goods of a particular class or manufactured by a particular method, the provisions of the Act with respect to false trade descriptions shall not apply to such trade description when so applied. On the facts found by quarter sessions the respondents do not bring themselves within that section. It is found that Norwegian brisling prepared in oil like sardines and labelled Norwegian sardines were put upon the English market in 1884 or earlier; but it is also found that the purchasing public did not know that the fish described as a Norwegian sardine was different from the French sardine. The description was therefore neither lawfully nor generally applied. This word "lawfully" in s. 18 does not mean merely not criminal; it means properly or correctly.

The public may not have known in 1884 that the fish obtained from France and described as a sardine was the same as the pilchard, but they were familiar with the flavour of the prepared sardine which is obtained from the material of the fish and the method in which it was prepared. The description Norwegian sardine was obviously used to convey to the public the erroneous impression that the fish known as a sardine could be obtained from Norway. The Act of 1887 was passed for the protection of the public: *Holmes* v. *Pipers*. (1) The use of a false description which misleads the public cannot be said to be lawful, even though there was no intention to defraud: *Wood* v. *Burgess*. (2) The object of s. 18 was to protect "well-known conventional descriptions" of goods, such as Brussels carpets, where a secondary meaning has been applied to names which would be misleading if they were now to be construed for the first time: *Rex* v. *Butcher* (3), per Lord Alverstone C.J.; *Gridley* v. *Swinborne*. (4) But in order that a trade description may acquire a secondary meaning and be "generally" applied, there must be a user of the description by the public as well as by the trade, and there is no finding of fact in this case that

(1) [1914] 1 K. B. 57.
(2) (1889) 24 Q. B. D. 162.
(3) (1908) 99 L. T. 622.
(4) (1888) 52 J. P. 791.

the public used the description Norwegian sardine before 1887, or at any time, to denote a brisling or sprat prepared in oil. The decision of the magistrate should therefore have been affirmed at quarter sessions. [*Fowler* v. *Cripps* (1), *Kirshenboim* v. *Salmon* (2), and *Marshall* v. *Ross* (3) were also referred to.]

Walter, K.C. (*Colefax*, K.C., and *Curtis Bennett* with him), for the respondents. No question is raised by the special case as to the use of the word sardine without the addition of the word Norwegian. The respondents make no claim to the right to use the words skipper sardine, or sardine simpliciter. The main question is whether upon the facts s. 18 affords a defence to the use by the respondents of the term Norwegian sardines to describe the goods sold by them. There is a subsidiary question raised by the case, namely, whether there has been any false description of material within the meaning of s. 3, sub-s. 1 (*d*). The Act of 1887 must be construed with reference to the Merchandise Marks Act, 1862, which it repealed. The earlier Act made it an offence to give a false description only of the number, quantity, measure, or weight of the article sold. By s. 2, sub-s. 1 (*d*), of the Act of 1887 it is made an offence to apply any false trade description to goods, and by s. 3, sub-s. 1, the expression "trade description" was extended to include any description as to the mode of manufacture and as to the material of which any goods are composed. But s. 18 excluded from the operation of the Act of 1887 trade descriptions which have been both "generally" (that is the word which was used in s. 9, the corresponding section in the Act of 1862) and "lawfully" applied to goods before the passing of the Act of 1887. The word "lawfully" in s. 18 of this Act, which is a criminal Act, means a user which was not prohibited by any statute imposing criminal liability. It cannot mean, as is suggested, properly or correctly, for the section presupposes that the description is not accurate; unless there is a misdescription no offence is committed, and the protection of s. 18 is not required. The case finds as a fact that since 1884 the article dealt in by the respondents has been described in the trade as a Norwegian sardine and as nothing

(1) [1906] 1 K. B. 16. (2) [1898] 2 Q. B. 19.
(3) (1869) L. R. 8 Eq. 651.

1915

LEMY v. WATSON.

else. It is said that the public were misled by this description. There is no evidence or finding of fact that this was so, but even if it were the case it would not make the description unlawful within the meaning of s. 18. In *Gridley* v. *Swinborne* (1) the article sold was gelatine described as "Swinborne's patent refined isinglass," whereas in popular and scientific language isinglass is the swimming bladder of the sturgeon, but it was held that the description "Swinborne's patent refined isinglass" had been lawfully and generally applied to the article sold within the meaning of s. 18. The section uses the word "applied," not "used," and the distinction is of importance, for s. 5 clearly indicates that the person who applies a trade description to goods is the trader who deals in those particular goods. It is, therefore, immaterial that in 1884 the purchasing public were unaware that the fish sold as a Norwegian sardine was a brisling. The public at that date were equally unaware that a sardine was a pilchard. The persons engaged in the trade described the article sold by them as a Norwegian sardine, and in 1884 there was no law to prevent their doing so. In *Rex* v. *Butcher* (2) the distinction is shown between a general user and a particular trade description generally used, by which a word acquires a secondary meaning and which is sufficient for the purpose of s. 18. With regard to the subsidiary point, the contention is that there has been no misdescription of the "material" of which these goods are composed within the meaning of s. 3, sub-s. 1 (*d*). Material there means raw material, which in this case is the flesh of a fish, but there is no evidence that the flesh of a brisling is different from that of a pilchard.

Sir R. B. Finlay, K.C., in reply. Sect. 18 says that the description must have been "lawfully and generally" applied. A description which misleads the public is not lawful. It is a fallacy to say that every act which is not criminal must necessarily be lawful. A trespass to land is not a criminal act, but it is not lawful. A description is not "generally" applied merely because it is used by a small number of traders; the description must be adopted and used by the public with full knowledge of the facts. The effect of the respondents' contention is that a

(1) 52 J. P. 791. (2) 99 L. T. 622.

section of an Act of Parliament, intended for the protection of the public, must be so construed as to enable a trader to give a false description to his goods in order to deceive the public.

LORD READING C.J. The respondents were summoned for having unlawfully sold goods to which they had applied a false trade description, namely, sardines, and they were convicted after a long hearing before Sir John Dickinson, the Chief Magistrate. They appealed to the Court of quarter sessions, and in the result the Court of quarter sessions differed from Sir John Dickinson and quashed the conviction and thus allowed the appeal, but they have stated a case for the opinion of this Court. The points involved are no doubt of considerable importance both to those engaged in this trade and to numbers of the public who purchase and consume sardines. The case made by the appellant, who represents a French trade society, is that a sardine is a small pilchard which is prepared in oil, packed in a tin in a way with which we are all familiar, and then sold in the tin as a tin containing sardines. The appellant says that the respondents have used a fish known as a brisling, which is the Norwegian name for a sprat or something like a sprat, which is prepared in oil in a similar fashion to the preparation of sardines in France, packed in tins, and sent over to this country and sold under the trade description of "Norwegian sardines." The appellant contends that the respondents have no right to apply the term "sardine" to their goods, and that they commit an offence by so doing. The respondents have contended before us, not that they are entitled to use the term "sardine" simpliciter, but that they are entitled to use the term "sardine" if accompanied by the local prefix, that is, "Norwegian," their contention being that the expression "Norwegian sardines" is a conventional description of the goods which they have been selling under that description, that this conventional description was in use and was applied before the passing of the Merchandise Marks Act, 1887, and that by reason of s. 18 of that statute they have not committed any offence, but are justified in the use and application of the term "Norwegian sardine."

1915

LEMY v. WATSON.

Lord Reading C.J.

It is worthy of observation that it is impossible to disentangle from the lengthy and considered judgment of the Court of quarter sessions a definite finding of fact that the term "Norwegian sardine" was generally applied as a trade description to Norwegian brisling or sprats, prepared and packed as I have described, before the year 1887. There are undoubtedly in this judgment sentences, I might even say many sentences, which by themselves would lead to the conclusion that it was the intention of the Court of quarter sessions so to find. But one is immediately confronted with other sentences which indicate that the Court cannot possibly have intended to come to that conclusion. It appears to me, having considered this judgment with the very able assistance of the learned counsel who have argued this case before us, that the Court of quarter sessions has halted at that finding. It has said that the description was false in fact but not false in law, and I understand the whole of the judgment, after the consideration that I have given to it, to mean this, that these Norwegian brisling or sprats, prepared in oil and packed in tins, could not properly be described under the statute of 1887 as Norwegian sardines. They were not sardines in fact because they were not the small pilchard which is the sardine proper, and even with the prefix "Norwegian" it was false in fact to say that these fish so prepared were Norwegian sardines. It is true they were Norwegian, but they were not sardines. That is what I understand the finding to be when it says that the description was false in fact.

But then the Court of quarter sessions says that notwithstanding that the description was false in fact it is not false in law. Having regard to the observations of the deputy-chairman and also to the way the case is stated, I come to the conclusion that what is meant is that but for s. 18 this would have been a false trade description, but because of s. 18 and of the facts and circumstances of the case it is not a false trade description. The question to my mind really resolves itself into this: whether or not it is established, either by a definite finding of fact or from all the facts as stated even though it may not be a definite finding of fact to that effect, that the trade description applied was one which had been applied before 1887 lawfully and

generally to these goods to indicate the particular method of their manufacture.

The Court of quarter sessions came to the conclusion, first, that although there had been a very small trade done before 1887 there was a trade which existed from 1884 or earlier in Norwegian brisling, and that the fish prepared and packed in the way I have stated were then sold as Norwegian sardines and described as Norwegian sardines, and it is contended that the Court has found (and I think there is justification for saying that the Court did intend to find) that that meant that the trade description had been applied generally to the goods of this class within the meaning of s. 18. Of course that would not be sufficient; the description must have been both lawfully and generally applied.

But I am not satisfied that upon this evidence it was open to the Court to come to the conclusion that the trade description was one that had been generally applied to these goods. It is worthy of notice that it is said there had only been a very small trade, but what appears to have been entirely left out of consideration in the judgment of the Court of quarter sessions, and in my view entitles me to differ from them in the conclusion of fact, is the position of the public, the purchasers, with regard to the application of this description to these goods, for the Court has dealt with the question as if it were solely a matter for the trade, that is, for sellers or manufacturers and dealers, as distinguished from the purchasers, who are the public.

Now it seems to me that the object of this statute was to protect the public against false descriptions which might be given to goods by members of the trade; and, in order to bring a case within s. 18, it is not sufficient to establish that, amongst the persons who were carrying on the trade, Norwegian sprats or brisling were shortly before 1887 described as "Norwegian sardines." One may very well pause to inquire, why were they described as sardines? It is clear from what has happened since the description was adopted that the persons engaged in this trade preferred to call Norwegian sprats "Norwegian sardines" because by that means they got a better sale for their goods, and they got a better sale because the public did not know that they were buying sprats and not sardines. In

1915

LEMY v. WATSON.

Lord Reading C.J.

my view that is the true meaning of what has happened in this case, and the consequence of it is that the finding of fact by the Court of quarter sessions is one which I find myself quite unable to accept. I differ from it because I think that the Court has wrongly directed itself in law upon this point.

I agree with the view put forward by Sir Robert Finlay which is founded on the observations of Lord Alverstone C.J. in *Rex* v. *Butcher* (1), where, in dealing with s. 18, he said: "It was that evil to which the Act was directed. What it did was to say that those well-known conventional descriptions which had been applied to various classes of goods should be protected." In an earlier part of his judgment he had said: "What is intended to be protected under this section is a trade description, lawfully and generally applied to goods of a particular class or manufactured by a particular method to indicate the particular class or method of manufacture of such goods." That is almost in terms stating the words of the statute. Lord Alverstone C.J. pointed out that the object of the section was to protect the conventional descriptions, such as "Brussels carpet," and other secondary meanings which have grown up in the course of time and of which instances have been given during the course of the case. I am myself quite satisfied that you cannot have within the provisions of this statute a conventional description or secondary meaning unless both sellers and purchasers have adopted that description. There can be no conventional description or secondary meaning made by the trade, the seller, to which the public, the purchaser, is not a party. I come to the conclusion, therefore, that the Court was wrong when it decided that this trade description had been "generally" applied before 1887.

But I do not rest my decision upon that ground alone. The Court also came to the conclusion that an act is done "lawfully" within the meaning of s. 18 if it does not involve the commission of a criminal offence. In my judgment that is giving too restricted a meaning to the word "lawfully." I do not think that it was intended by the use of that term that the adoption of any conventional meaning should be protected

(1) 99 L. T. 622.

provided that its use does not constitute an infringement of the criminal law and that the term has been generally applied. In my opinion the word "lawfully" means that the use of the conventional trade description must have been lawful in the widest sense of the term, and that it is not restricted merely to implying that there has been no infringement of the criminal law. I am satisfied, therefore, that the Court of quarter sessions was wrong in its conclusion upon this point also.

The case is so stated that if this Court comes to the conclusion that the Court of quarter sessions was wrong in its construction of s. 18 the appeal must be allowed and the conviction restored. It follows in my judgment, from what I have said, that, not only from the way in which the case is stated but also from the way in which the case has been argued and presented before us, the conclusion to which Sir John Dickinson arrived was the right conclusion and that the Court of quarter sessions was wrong, and for these reasons I think this appeal must be allowed and the conviction restored.

DARLING J. I have come to the same conclusion, though I admit that my opinion has wavered a good deal during the argument, not always in favour of the counsel addressing the Court.

The question really is, as it seems to me, whether it is legitimate to offer for sale under the name of Norwegian sardines sprats caught and prepared in Norway in a manner which makes them look like what are commonly sold as sardines. It could not possibly be right, and it would be an offence against the law relating to trade descriptions, to do this unless it has been rendered lawful by s. 18 of the Act of 1887. That section says that no offence will be committed in regard to a trade description although that trade description may not be accurate, provided the description in question has been before 1887 lawfully and generally applied.

With regard to the meaning of the word "applied" in that section, seeing that it is qualified by the word "generally," I do not think it can be limited to the application of a trade description by the persons engaged in the particular trade. The use of an inaccurate trade description is not excused unless it was done before 1887 both lawfully and generally. With regard to

1915

LEMY v. WATSON.

Darling J.

"lawfully," I was impressed for some time by Mr. Walter's argument that "lawfully" merely meant not unlawfully in the criminal sense, but having regard to all the matters with which this Act was dealing and with the other words used I do not think we can give it that limited meaning. There are many things unlawful which are not forbidden by a criminal statute or by the common law as to criminal offences. I think that a good instance is found of the use of the word "lawful" when a person is charged with doing something "without lawful excuse." It could be shown that the act was done without a lawful excuse although it could not be shown that the person had committed any criminal act or rendered himself liable to fine or imprisonment, and I think that the word "lawfully" in s. 18 is used in that sense.

But I do not think very much depends in this case on the word "lawfully," because in my opinion it is quite clear that the description "Norwegian sardines" cannot be said to have been "generally" applied. I have tried to think what "generally" there means, and there are cases already decided in this Court which show that the description must have become a conventional term. It must of course be an erroneous term, otherwise the question does not arise; and in my view the word "generally" means that the erroneous description is one which has been consecrated by common use. That is my notion of what would be a good definition of "generally applied."

There are many erroneous terms consecrated by common use. One which has been mentioned in the course of the argument, a glaring instance, is the term "Bombay ducks" as applied to an Indian fish, and it is agreed that if anybody ordered Bombay ducks and somebody supplied him with ducks from Bombay the contract to supply Bombay ducks would not be fulfilled. Another obvious instance is eau de Cologne. Whatever eau de Cologne may be, as to which I know nothing, it certainly is not water from the Rhine. If eau de Cologne were ordered and you simply supplied a gallon of water from Cologne that would not fulfil the contract. Another instance where anybody would understand what was meant is if you speak of Roman pearls. They are not pearls with which any oyster has had anything to do, nor do I know that they are Roman. They indicate something which is

probably neither Roman nor a pearl, just as it was said by a well-known historian that the Holy Roman Empire had for its chief characteristic that it was neither holy nor Roman nor an empire. One other instance occurs to me of a term consecrated, if I may say so, by common user which does not indicate the true fact, and that is when people speak as they commonly do of the judicial ermine, meaning merely any white fur when worn by a judge. These expressions have become conventional terms, and are, I think, instances of a trade description lawfully and generally applied; and I come to the conclusion that they are generally applied for the reason that their use is not limited to the particular persons who produce the article and those who buy it for the purpose of retailing it to the public. I think that "generally applied" must include all those who may possibly buy the article or who may talk about it. It must be a word adopted into the language in some such way as the words which I have indicated have been adopted into the language.

Therefore, seeing that there is no excuse for the selling of these things as Norwegian sardines, unless the excuse can be found in s. 18 of the Act of 1887, I think that the decision of the Court of quarter sessions, which proceeded upon a wholly different interpretation of the statute from that which I have indicated, was wrong and should be reversed.

AVORY J. I am of the same opinion. The respondents to this appeal were originally charged before the Chief Magistrate at Bow Street with the offence of selling goods to which the false trade description of "sardines" was applied, and the case appears to have proceeded before the Chief Magistrate at Bow Street upon the lines that the description of "sardines" was falsely applied to those goods. The Chief Magistrate decided the case on that ground and found as a fact that the trade description "sardine" was not at the passing of the Merchandise Marks Act, 1887, a trade description lawfully and generally applied to goods of this particular class.

Upon appeal to the Court of quarter sessions the respondents appear to have abandoned any contention that "sardines" could be lawfully applied as a trade description and to have

1915

LEMY v. WATSON.

Avory J.

contended that they had not sold these goods under that trade description, but that they had sold them under the description of "Norwegian sardines." The appellant appears to have conducted the case at quarter sessions on those lines, accepting the view that the contest was as to whether these goods could properly be described as Norwegian sardines.

My own view, looking at the wording on the tin which has been produced before us, is that the respondents were liable to be convicted of selling these goods under the trade description of "sardines," and that if the case had proceeded at quarter sessions upon that point alone there would have been no ground for reversing the decision of the Chief Magistrate. But dealing with the case as it is presented to us now, the question being whether the respondents were applying a false trade description to these goods in describing them as "Norwegian sardines," I have come to the conclusion that the Court of quarter sessions was wrong in law in the construction which they put upon s. 18 of the Merchandise Marks Act, 1887.

If there had been in this special case an express finding of fact by the Court of quarter sessions in the terms of s. 18 that the trade description "Norwegian sardine" was lawfully and generally applied to goods of a particular class to indicate the particular class in the year 1887 I doubt whether this Court could have interfered, but I agree with what has been said by my Lord and my brother Darling, that when you look at this case, somewhat complicated as it is, it is impossible to say that there is any definite finding of fact in the terms of s. 18. I think the Court of quarter sessions were wrong in their view of the law and I think Mr. Walter was wrong in his contention that the word "lawfully" in s. 18 refers only to acts which are not contrary to the criminal law. My own impression is that the deputy-chairman of quarter sessions went even further and construed it to mean anything which does not render the person doing it liable to be convicted of obtaining goods by false pretences. I think that is the view which he really took of that word "lawfully." But in either view, in my opinion, the decision was wrong, and I will only add what I think is the true meaning of this expression "lawfully and generally

applied to goods of a particular class to indicate the particular class." In my view it means a description which was applied in such circumstances at that time, namely, in 1887, as was not calculated to mislead the public or the purchaser. I think that view is borne out by the later part of the section because there is a proviso to this exception. Having excepted out of the operation of the Act a trade description which is lawfully and generally applied to goods to indicate the particular class, the section provides that where such trade description includes the name of a place or country and is calculated to mislead as to the place or country where the goods to which it is applied were actually made or produced, then there must be added to the trade description the name of the place in which the goods were actually made or produced. I think that that shows that the idea running through this section is that the description which is contemplated in the earlier part is one which is not calculated to mislead; in other words, a description which the purchasing public have come to recognize as being a description of goods the nature of which they perfectly well understand, such, for instance, as the case put during the course of the argument of the Bath bun, which everybody in 1887 knew did not mean a bun that was made in Bath.

Mr. Walter in supporting his contention was driven to say that traders who before 1887 had been in the habit of selling chicory as coffee would be protected if they could show that it had been the habit generally among traders to sell chicory as coffee. In my view this section was not intended to have any such effect; in other words it was not intended to perpetuate error or to protect dishonest trading. The very object of the whole statute was the contrary.

For these reasons I agree that the judgment of the Court of quarter sessions must be reversed and the conviction restored.

Appeal allowed.

Solicitors for appellant: *Halse, Trustram & Co.*

Solicitors for respondents: *Radford & Frankland, for Maughan & Hall, Newcastle-on-Tyne.*

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1915
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STOCK *v.* CENTRAL MIDWIVES BOARD.

Midwives—"Misconduct"—Removal of Name from Roll—Decision of Central Midwives Board—Appeal—Statement in Nature of Evidence before Board not verified by Statutory Declaration—Inaccuracies in Statement—Midwives Act, 1902 (2 *Edw.* 7, *c.* 17), *ss.* 3, 4—*Rules of Procedure on Removal of Name from Roll*, 1911, *r.* 2.

By s. 3 of the Midwives Act, 1902, power is conferred on the Central Midwives Board to frame rules regulating their own proceedings and to remove from the roll the name of any midwife disobeying the rules, "or for other misconduct."

By s. 4, "Any woman thinking herself aggrieved by any decision of the Central Midwives Board removing her name from the roll of midwives may appeal therefrom to the High Court of Justice . . . . but no further appeal shall be allowed."

By r. 2 of the Rules of Procedure, 1911, made by the Board, "All statements in the nature of evidence proposed to be relied on as part of the case against the accused person . . . . which cannot be laid before the Board by such evidence, shall be verified by statutory declaration. A copy of any such statutory declaration . . . . shall be supplied free of cost to the accused person before the day fixed for the meeting of the Board to deal with the case, or for the adjournment thereof."

By Order LIX., rr. 19 and 20, of the Rules of the Supreme Court, 1883, an appeal from any decision of the Central Midwives Board, under the Midwives Act, 1902, shall be made to the Divisional Court by notice of motion, and supported by affidavit, or, if the Court shall so direct on the hearing of the motion, by oral evidence, and the appeal shall be set down in the Crown paper for hearing as if it were an appeal from an inferior Court.

The appellant, a midwife whose name was upon the roll, was charged before the Board with having been guilty of misconduct within the meaning of s. 3 of the Act of 1902, in that she had been and still was cohabiting with a man not her husband. An inquiry took place before the Board, and at the first meeting she gave evidence. At an adjourned meeting, of which she had notice but at which she did not appear, the Board had before them a report by a relieving officer not verified by statutory declaration and of which no copy had been supplied to the appellant, as required by r. 2 of the Rules of Procedure, 1911. The Board decided that the appellant had not told the truth and removed her name from the roll. Certain statements in the report were inaccurate and might well have influenced the Board in arriving at their decision.

Held, (1.) that under rr. 19 and 20 of Order LIX. the Divisional Court had power to hear further evidence by way of affidavit, or oral evidence; (2.) that the misconduct dealt with by s. 3 of the Act of 1902 was not limited to misconduct in the discharge of the duties of a midwife, but

included misconduct which in the opinion of the Board tended to unfit the appellant for the discharge of the duties of a midwife; (3.) that if the facts had justified the Board in coming to the conclusion at which they had arrived, they would have been entitled, if they thought fit, to remove the appellant's name from the roll; but (4.) that as the report of the relieving officer had been irregularly admitted, and as it was impossible to say that the Board was not influenced by the inaccurate statements in it, the order removing the appellant's name from the roll must be quashed.

Semble, a full right of appeal is given by the Act of 1902.

APPEAL by Mrs. Lucy Henrietta Stock, a midwife, against a decision of the Central Midwives Board removing her name from the roll of midwives by virtue of the power conferred upon the Board by s. 3, clause V., of the Midwives Act, 1902 (1), upon the ground that she had been guilty of misconduct within the meaning of the section, the misconduct alleged being that she had been and still was cohabiting with a man not her husband.

(1) Midwives Act, 1902 (2 Edw. 7, c. 17), s. 3: "On the passing of this Act, the Lord President of the Council shall take steps to secure the formation of a Central Midwives Board . . . .

"The duties and powers of the Board shall be as follows:—

"I. To frame rules —

"(*a*) regulating their own proceedings;

. . . .

"V. To decide upon the removal from the roll of the name of any midwife for disobeying the rules and regulations from time to time laid down under this Act by the Central Midwives Board, or for other misconduct, and also to decide upon the restoration to the roll of the name of any midwife so removed;

. . . .

"Rules framed under this section shall be valid only if approved by the Privy Council."

By s. 4, "Any woman thinking herself aggrieved by any decision of the Central Midwives Board removing her name from the roll of midwives may appeal therefrom to the High Court of Justice . . . . but no further appeal shall be allowed."

Order LIX., r. 19, of the Rules of the Supreme Court, 1883: "An appeal from any decision of the Central Midwives Board, under the Midwives Act, 1902, shall be made to the Divisional Court by notice of motion, and supported by affidavit, or, if the Court shall so direct on the hearing of the motion, by oral evidence."

Rule 20: "The notice of motion shall be an eight days' notice, and shall be filed at the Crown Office, and upon filing the notice the appeal shall be set down in the Crown paper for hearing as if it were an appeal from an inferior Court."

1915

STOCK v. CENTRAL MIDWIVES BOARD.

The appellant, Mrs. Stock, had lived with her husband until 1909, and had had two children by him, but in that year she obtained a separation order owing to his misconduct. The custody of the children was given to her, and the husband was ordered to pay her 10*s.* a week; but he did not obey that order, and she was obliged to earn her own living. In 1912 she met a man named Hill and had a child by him. In July, 1914, the Board served on her a notice that she was charged with misconduct in cohabiting with Hill, who was not her husband. At the time of the action of the Board she had gone to live in Hill's house with his sister. She attended an inquiry before the Board on July 22, 1914, and in her evidence gave explanations as to why she obtained the separation order. She gave evidence to the effect that her husband had been in prison once, and had been twice arrested for not paying for the maintenance of the children, and also said that the reason why Hill took the house was that he got his coal and other things free and wanted to do what he could for the child and herself. She further gave evidence to the effect that there had been no immoral relations between herself and Hill since 1912. The inquiry was adjourned until October, 1914, as the Board wished to make further investigations. Notice was given to the appellant of the adjourned inquiry, but she did not appear. The Board met in her absence and had before them a report by a relieving officer not verified by statutory declaration and of which no copy had been supplied to the appellant as required by r. 2 of the Rules of Procedure on the Removal of a Name from the Roll, and on the Restoration to the Roll of a Name removed, framed by the Board. (1) The

(1) Rules of Procedure on the Removal of a Name from the Roll, and on the Restoration of a Name removed, framed by the Central Midwives Board under s. 3 of the Act of 1902, and approved by the Privy Council on June 21, 1911 :—

Rule 1 : "When it is reported to, or otherwise brought to the attention of, the Central Midwives Board that a midwife has been convicted of a felony, misdemeanour, or offence, or has been guilty of wilfully disobeying the rules and regulations laid down under the Midwives Act, 1902, or of other misconduct, the secretary shall, when investigation by the local supervising authority is required, forthwith communicate such report or information to the local supervising authority of the area within which the midwife resides, or of that in which the felony, misdemeanour, offence, act

1915

STOCK v. CENTRAL MIDWIVES BOARD.

report contained statements which the Divisional Court (having regard to affidavits filed in support of the appeal and which the Court held they had power to receive in evidence) found were inaccurate. The inaccurate statements reflected upon the veracity of the appellant in the evidence given by her before the Board in such a way as might very well have led them to the conclusion that her evidence that she was not cohabiting with Hill was not worthy of credence. The Board came to the conclusion that the appellant had not told them the truth with regard to her past life in reference to her husband and the children and removed her name from the roll.

Mrs. Stock appealed, and in support of the appeal the appellant, Hill, and his sister filed affidavits denying that any immoral relations existed between the appellant and Hill, and the appellant repeated that no immoral relations had existed between herself and Hill since 1912.

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of disobedience of the rules and regulations, or other misconduct is alleged to have been committed (as the case may be), and ask such authority to investigate the matter, and to report whether or not, in their opinion, a prima facie case of malpractice, negligence, or misconduct has been established against the midwife. Any report by a local supervising authority shall, as soon as may be after its receipt by the secretary, be laid, with all other information relating to the case to which it refers, before the Penal Cases Committee, who shall report thereon to the Board, and upon such report the Board shall proceed to consider whether such a case has in their opinion been made out as to require an answer from the accused person."

Rule 2: "All statements in the nature of evidence proposed to be relied on as part of the case against the accused person . . . . which cannot be laid before the Board by such evidence, shall be verified by statutory declaration. A copy of any such statutory declaration . . . . shall be supplied free of cost to the accused person before the day fixed for the meeting of the Board to deal with the case, or for the adjournment thereof."

By rr. 3 and 4, if the Board decide that such case has been made out, proceedings for the removal of a name from the roll shall be commenced by the issue of a notice in writing specifying the nature and particulars of the charge alleged against the accused person and informing her of the day on which the Board intend to deal with the case and decide upon the charge, and the notice is to be sent by a registered letter to the accused person.

Rule 8: "If the accused person does not attend as required, either personally or by representative, the Board may proceed to hear and decide upon the charges in her absence."

1915

STOCK v. CENTRAL MIDWIVES BOARD.

J. F. Eales, for the appellant. The Central Midwives Board is a judicial body: *In re Feldmann* (1); and a full right of appeal is given to this Court by s. 4 of the Midwives Act, 1902. Order LIX., r. 19, of the Rules of the Supreme Court, 1883, shows that, if necessary, this Court will hear further evidence.

The word "misconduct" in s. 3, clause V., of the Midwives Act, 1902, does not include conduct which does not affect the professional capacity of a midwife. The Board is not entitled to inquire into her domestic relations. The word "misconduct" means misconduct as a midwife, i.e., of such a nature that it tends to unfit her for carrying out her duties as a midwife. There was no more reason for removing the appellant's name from the roll than there would be for removing the name of a medical man from the Medical Register who was living with a woman not his wife. In *In re Weare* (2) a solicitor was convicted of knowingly being the landlord of a brothel, and it was held that the Court would not as a matter of course strike him off the roll because he had been convicted, although in the particular case the Court considered that the nature of the offence was such that he ought to be struck off. If the Legislature had intended to include immorality as a reason for the removal of the name of a midwife from the roll it would have used the term "immorality." "Misconduct" means something ejusdem generis with the preceding words. By s. 8, sub-s. 2, of the Act of 1902 it is the duty of the county council "to investigate charges of malpractice, negligence or misconduct on the part of any midwife practising within their area, and, should a prima facie case be established, to report the same to the Central Midwives Board." The collocation of the words in that sub-section shows that "misconduct" is something which tends to make the woman unfit to be a midwife.

By r. 2 of the Rules of Procedure made by the Board in 1911 the appellant ought to have been supplied with a copy of the report, and the report ought to have been verified by statutory declaration. It was of the utmost importance that she should have received a copy of the report, as she could have then shown to the Board the inaccuracies it contained. By omitting to

(1) (1907) 71 J. P. 269. (2) [1893] 2 Q. B. 439.

supply the appellant with the copy of the report the Board committed a breach of their own rules and acted in a manner contrary to the principles of justice.

Lord Robert Cecil, K.C., and *T. Mathew*, for the respondents. The object of the Midwives Act, 1902, is to provide, and to obtain a trustworthy roll of, a number of midwives of a trustworthy character. The Central Midwives Board is not a judicial body. It is an administrative body of experts. But in order to avoid any injustice the right of appeal to this Court is given. But the Court will not lightly overrule the opinion of the Board that from a midwifery point of view an act is an act of misconduct, and the Court is entitled and bound to consider the evidence as it was before the Board.

For the purpose of the present case it is not necessary to contest the proposition that the misconduct within the meaning of the Act of 1902 must be misconduct which tends to unfit the midwife for her calling. But the Court will be slow to differ from the opinion of the highly qualified Board as to what is misconduct tending to unfit the woman for her duties as a midwife. A woman of immoral character is not suitable for a midwife. The patient is laid up at the time the midwife comes into the house, and the midwife is free to come in day and night. A general rule that a midwife must not be living with a man not her husband is a good working rule. She is in a position of great trust and confidence. The appellant did not see fit to leave Hill's house after the first hearing. When the matter had once become public it became a grave matter for the Board to consider. If it is not quite unreasonable of the Board to hold that a midwife must be of a moral character, the Court will not interfere with the decision. The Board is entitled to regard as misconduct any act which they honestly and reasonably think is misconduct in relation to her calling as a midwife.

It must be admitted that there was an irregularity on the part of the Board in reading the report without its being verified by statutory declaration and in no copy of a statutory declaration having been supplied to the appellant. By s. 3, clause V., of the Act of 1902 there is power to restore to the roll a name

1915

STOCK v. CENTRAL MIDWIVES BOARD.

which has been removed, and rr. 13 to 18 of the Rules of 1911 provide the machinery for doing so. [The Medical Act, 1858 (21 & 22 Vict. c. 90), s. 28, was also referred to.]

LORD READING C.J. This is an appeal by Mrs. Stock, a married woman, against a decision of the Central Midwives Board removing her name from the roll of midwives. [Having stated the facts his Lordship continued:] The Board met in her absence, as they were entitled to do under r. 8, and had before them a report of a relieving officer containing statements which were inaccurate with regard to her and which certainly cannot be said to have had no influence upon the Board in the decision at which they arrived that her name must be removed from the roll of midwives. They accordingly removed her name, which they had the power to do under s. 3 of the Midwives Act, 1902. That statute was passed for the better training of midwives and to regulate their practice, and one of its objects was to place midwives under an administrative Board composed of persons of eminence, repute, and experience in the treatment of persons who are confined of children and, consequently, who require the services of midwives. The powers of the Board are defined by the Act, and they have power (amongst other things) to make rules subject to approval by the Privy Council. They accordingly made rules which were approved by the Privy Council. There is no appeal from any decision of the Central Midwives Board except under s. 4 of the Act of 1902. It is not necessary for our decision in the present case, in view of the conclusion at which we have arrived, to determine whether the right of appeal to this Court given by that section is limited, or whether there is a full right of appeal by way of rehearing, but as the point has been argued before us and it was left open in *In re Feldmann* (1), I desire to say that in my view the right of appeal thus given is as full as is given by any statute which confers a right of appeal to this Court, and that rr. 19 and 20 of Order LIX. of the Rules of the Supreme Court, 1883, make it plain that this Court has power to hear further evidence by affidavit, or oral

(1) 71 J. P. 269.

evidence if it so chooses. The object of the Legislature was to enable the Board to administer the affairs regulating the practice of midwives and to give them the unrestricted right to administer those affairs subject to this one right of appeal; and in my view, when a case of this kind is brought to this Court, it is the duty of the Court to see that justice is done, and, in the absence of restricting or hampering words in the section, the Court must inquire into all the circumstances, and is absolutely unfettered in any investigation which it may think right to make in order to ascertain the facts.

Three points have been taken by Mr. Eales, who has argued with ability and moderation. The first was that, assuming the facts to be as found by the Board, namely, that Mrs. Stock was a married woman and was cohabiting with Hill in the house at Longford, such conduct is not misconduct within the meaning of the statute; that the words used in clause V. of s. 3 of the Act, which enumerates the duties and powers of the Board "to decide upon the removal from the roll of the name of any midwife for disobeying the rules and regulations . . . . or for other misconduct," do not give to the Board the right to determine that a person on the roll shall be removed because she is living what the Board may think an immoral life, that is, immoral in the sense that as a married woman she is cohabiting with a man not her husband. It is right to say that there is no other suggestion of any sort or kind made against this woman's character and that whatever charge is made against her is limited entirely to the facts relating to what she did after the very unhappy married life which she seems to have led. I only desire to say that in my view the misconduct dealt with by the section is not limited to misconduct in the discharge of the duties of a midwife. If it is misconduct in the opinion of the Board which tends to unfit her for the discharge of the duties of a midwife, then the Board has the right to treat it as misconduct under the statute and to visit it with the penalties which in their opinion it deserves. Further, I do not wish it to be thought that if the facts and the circumstances of this case upon a true view of them justified the Board in coming to the conclusion at which they arrived with regard to the life which Mrs. Stock was living, they would not be

1915

STOCK v. CENTRAL MIDWIVES BOARD.

Lord Reading C.J.

entitled, if they thought fit, to decide that she was leading a life which would justify them in removing her name from the roll. Each case, of course, must be dealt with on its own circumstances. It seems to me that no persons can be more fitted to determine a matter of this kind than a Board constituted as this Board must, under the statute, be constituted.

The second point taken by Mr. Eales was that the Board wrongly and in breach of the rules which they themselves had framed and which had been approved by the Privy Council admitted evidence against the appellant.

Thirdly, he took the point that the evidence which they admitted, and which was heard in her absence, contained inaccurate statements which must have had influence upon the decision of the Board.

Now it is quite clear that under r. 2 the Board ought to have had the report of the relieving officer verified by a statutory declaration, and that a copy of it ought to have been supplied free of cost to the appellant before the day fixed for the meeting of the Board at which they were to deal with the case or for the adjournment thereof. The report received from the relieving officer by the Board was not verified by statutory declaration. No copy of that statutory declaration, or, indeed, of the report, was submitted to Mrs. Stock before the adjourned hearing in October. That is in itself a serious matter. Where, as in the present case, the Board was sitting as a judicial tribunal and had to decide whether the name of a person was to be removed from the roll, it is essential that the Board should strictly comply with its own rules. A person in the position of Mrs. Stock would be quite justified in thinking that there was nothing further to be said against her, that no further evidence was going to be brought forward except such as would represent what she knew to be the true statement of affairs and which she did not fear. If there was any such evidence to be adduced against her a copy of it ought to have been sent to her, and in cases of this character, if this Court comes to the conclusion that evidence has been used in breach of the rules, and also without any notification of it to the accused person,—in the present case it was used in breach of the rules, first, because it had not been

verified on oath or by a statutory declaration; secondly, because the copy of the statutory declaration was not sent to the appellant,—that in itself, in my judgment, ought to be fatal in a case of this character. A woman's name ought not to be removed from the roll in consequence of a decision of the Board against her, unless that decision is arrived at in strict compliance with the rules framed by the Board.

But the present case does not rest there. It appears from the facts which we have now before us that the statements irregularly admitted were inaccurate, and that if they were accepted by the Board as accurate they reflected upon the veracity of Mrs. Stock in the statements she had made to the Board when they had heard her evidence, and in such a way as may very well have led the Board to the conclusion that Mrs. Stock's statement made on oath that she was not cohabiting with this man was not worthy of credence. I can quite well understand the Board coming to the conclusion that, as she had misled them in a number of statements she had made to them on oath, they were not inclined to place much reliance upon her statement as to the question itself which was being investigated before them. One cannot but think that if the Board had had the true statement before them,—that all that she had told them about her past life was quite true,—and proper examination and evidence would have disclosed the fact which is now disclosed to us, that she was an ill-treated person who had suffered from the treatment of her husband, and had been left to look after the two children without the assistance of the husband, and that she truly said that the custody of the two children was given to her, they might have arrived at a different conclusion. They had not that evidence before them, and dealt with evidence irregularly admitted before them and came to a conclusion upon it. In my judgment when the true facts are arrived at, as they have been in this Court beyond all question, and when it is therefore known that the evidence given in her absence before the Board was inaccurate evidence reflecting upon her statements, that knowledge is another reason for coming to the conclusion that the removal of her name from the roll cannot be supported. I only desire to add

1915

STOCK v. CENTRAL MIDWIVES BOARD.

Lord Reading C.J.

that, having had the advantage of having further evidence brought before us than was before the Board, and also of hearing the case argued and discussed in a way it was not discussed before the Board, we come to the conclusion on the material presented to us that the order of the Board removing her name from the roll cannot be supported, and that this appeal must succeed.

AVORY J. I am of the same opinion. I concur in the judgment which my Lord has delivered and in every reason that he has given for it. I only desire to add two observations.

If this case had rested solely upon the allegation that the appellant was cohabiting in the place where she carried on her profession with a man who was not her husband, I am not prepared to say that the Board would not have been justified on that ground alone in removing her name from the roll, or that this Court ought to have differed from their conclusion upon the evidence which was before them in this case as it then stood. I think it has to be borne in mind that patients who would be attended by a midwife have to be considered. Women are very sensitive of each other's honour; more so, perhaps, sometimes, than they are of their own, and certainly much more so than men of each other's honour in matters of this kind; and it might be exceedingly mischievous to allow a woman to attend patients if there were reasonable ground for believing that she was, and if she were reputed in the neighbourhood to be, leading an immoral life.

The other observation I wish to make is this. As I have said, if the case rested solely upon the allegation with regard to the appellant's mode of life, I should not have been prepared to differ from the conclusion to which the Board came; but it is clear from the shorthand note of the proceedings on the first hearing which is made an exhibit to one of the affidavits before us that the Board were anxious to ascertain, first, whether in fact the guardians had taken away the children of the appellant from her on account of her mode of life, and, secondly, whether she was speaking the truth in the account which she gave to them of that matter.

1915

STOCK v. CENTRAL MIDWIVES BOARD.

Avory J.

The report to which my Lord has referred was before the Board at the adjourned hearing and a part of it was read as evidence before them. The part which was read contained statements which must have led the Board to believe that the appellant had not spoken the truth when she said that her husband had been in prison once, and twice arrested for not paying for the maintenance of these children; and it must also have led them to believe that from the guardians' point of view the appellant had been guilty of some dereliction of duty towards her children in contributing nothing to their support. It is obvious, therefore, that it would be impossible for this Court, whatever might be its powers,—I perfectly agree with my Lord's pronouncement on the powers of this Court on the hearing of the appeal,—even if they were more limited than he has pronounced them to be, to hold that the Board was not influenced against the appellant by statements of fact which we now know to be inaccurate; and for those reasons I agree that the appeal should be allowed.

Low J. I also agree with everything that has been said by the Lord Chief Justice in his judgment in this case. Speaking for myself, I do not desire to lay down—and I understand that my Lord did not desire to lay down—any general rule with regard to the mode in which the facts of any particular case should be dealt with; but with regard to the facts of this particular case only, and to the conduct of the investigation of it, I am quite satisfied that this Court is doing right in ordering that the name of this woman should be replaced on the roll of midwives.

Appeal allowed. Order of Board quashed.

Solicitor for appellant: *D. E. Rodwell, for W. Henderson-Cleland, Coventry.*

Solicitor for respondents: *Julius Bertram.*

J. E. A.

1915
April 14, 15, 16, 20, 21, 22, 23; *July* 9.

THE KING *v.* BLOOMSBURY INCOME TAX COMMISSIONERS.

Revenue—Income Tax—If the Surveyor "discovers" that First Assessment is inaccurate—Additional First Assessment to be made—Jurisdiction of Additional Commissioners—Appeal to General Commissioners—Prohibition to Commissioners—Income Tax Act, 1842 (*5 & 6 Vict. c.* 35), *ss.* 106, 161 —*Taxes Management Act*, 1880 (*43 & 44 Vict. c.* 19), *s.* 52; *s.* 57, *sub-s.* 3.

By s. 52 of the Taxes Management Act, 1880, "If the surveyor discovers that any . . . . profits chargeable to the duties have been omitted from the first assessments, or that any person so chargeable has not made a full and proper or any return, or has not been charged to the said duties, or has been undercharged in the said first assessments, ... then" (sub-s. 2, amended by s. 23, sub-s. 2, of the Finance Act, 1907) "as regards duties chargeable under Schedule D . . . . the additional Commissioners shall . . . . make an additional first assessment" on any such person in such sum as according to their judgment ought to be charged on him, subject to objection by the surveyor and to appeal.

By s. 57, sub-s. 3, "a person aggrieved by an assessment upon him included in any first or additional first assessment shall . . . . be entitled to appeal to the General Commissioners against such assessment . . . .":—

Held, that under the above sections, coupled with the Income Tax Acts, the surveyor has jurisdiction to report if he "discovers"—i.e., if he honestly comes to the conclusion upon the information in his possession—that a person chargeable has not made a full and proper return to income tax, and that the additional Commissioners have jurisdiction then to make an additional assessment upon that person which is binding unless challenged by the means prescribed under the statutes.

Held, further, that the decision of the additional Commissioners can only be challenged by an appeal to the General Commissioners under s. 57, sub-s. 3, of the Taxes Management Act, 1880, whose decision is final subject to the right of the person assessed to require the statement of a case for the opinion of the High Court upon questions of law under s. 59, sub-s. 1, of the Act of 1880.

Held, therefore, that a writ of prohibition will not be granted to restrain the Commissioners from proceeding upon the assessment unless it can be shown that there were no grounds upon which the surveyor or Commissioners could honestly have believed that the person assessed is chargeable.

Rule Nisi obtained at the instance of Horace Everett Hooper calling upon the additional Commissioners and the General

1915

REX v. BLOOMSBURY INCOME TAX COMMISSIONERS.

Commissioners of the Income Tax for the division of St. Giles-in-the-Fields and St. George, Bloomsbury, to show cause why a writ of prohibition should not be awarded prohibiting them respectively from making, entertaining, acting on, or proceeding on or in respect of three several assessments purporting to be made under Sched. D of the Income Tax Acts for the years ending April 5, 1910, 1911, and 1912 respectively against Horace Everett Hooper whether on or against him or on or against him jointly with Walter M. Jackson or otherwise.

Notice of the rule was to be given to the said additional and General Commissioners for Bloomsbury and to the surveyor of taxes.

The following statement of the facts is in substance taken from the judgment of Lord Reading C.J. :—

In 1913 additional assessments to income tax were made upon Horace Everett Hooper and Walter Montgomery Jackson for the three years ending April 5, 1910, 1911, and 1912 respectively, under Sched. D, for profits of a business carried on by them in partnership at 125, High Holborn, including profits made through their agents Hooper & Jackson, Limited, and the Encyclopædia Britannica Company of Illinois. Hooper and Jackson were American citizens, but Hooper resided in England, in the county of Hertfordshire. On behalf of Horace Everett Hooper a rule was obtained calling upon the additional Commissioners and General Commissioners of Taxes for the division of St. Giles-in-the-Fields and St. George, Bloomsbury, to show cause why they should not be prohibited from acting or proceeding upon the assessments. The ground of the application was that Hooper was not chargeable to the duties as he did not carry on business in partnership with Jackson or at all at the said address or within the district, and that therefore the income tax authorities had no jurisdiction to make or proceed upon any of the assessments.

In support of the motion for the rule evidence was filed asserting (*a*) that the applicant had not at any time during the period in question been engaged in or carried on any trade or business in partnership with Jackson or at all either at 125, High Holborn or elsewhere within the jurisdiction of the

1915

REX v. BLOOMSBURY INCOME TAX COMMISSIONERS.

Commissioners or within the United Kingdom, (*b*) that the applicant attended at 125, High Holborn solely in his capacity of chairman of the board of directors and managing director of the Encyclopædia Britannica Company, Limited (which company until October, 1910, bore the name of Hooper & Jackson, Limited), whose offices are at 125, High Holborn, and (*c*) that he had been duly assessed and had paid income tax under Sched. E in respect of the emoluments of his directorship.

On behalf of the Crown affidavits were filed to establish that the surveyor of taxes had received information which led him to the conclusion that the offices at 125, High Holborn were used for the purpose of a business carried on by the applicant jointly with Jackson and that the companies acted as their agents, and consequently that the applicant had not made a full and proper return in respect of the years in question. The information relied upon was contained in a voluminous record of proceedings in the Court of Chancery of New Jersey, in the United States of America, brought by Jackson against Hooper for the appointment of a receiver and for dissolution of the partnership said to have been then existing between them and to have been carried on at 125, High Holborn. There was information before the surveyor in the American proceedings that the applicant and Jackson "were also from time to time engaged in other joint enterprises and business operations in the profits and losses of which they were equally entitled to share," and in support of this statement reliance was placed upon an agreement of October 28, 1906, between Arthur Fraser Walter of the one part and Hooper and Jackson of the other part. The applicant and Jackson were there described as "publishers" of 125, High Holborn. The agreement dealt partly with the publication and sale of certain editions of the Encyclopædia Britannica and with the accounts between the parties relating thereto. There were various clauses in the agreement which appeared to establish prima facie that the applicant and Jackson were at the date of the agreement carrying on and intending to carry on partnership business at 125, High Holborn. The surveyor of taxes having considered these proceedings claimed to have discovered, within the meaning of s. 52 of the Taxes Management Act, 1880, that

the applicant had carried on business in partnership with Jackson at 125, High Holborn, and had not made a full and proper return of duties chargeable under the third rule of the "Rules applying to both the preceding Cases" (i.e., first and second cases under the heading "Schedule D") in s. 100 of the Income Tax Act, 1842. (1) The surveyor duly communicated the result of his discovery to the additional Commissioners for the district, who thereupon made an additional first assessment upon the applicant, which was in due course confirmed by the General Commissioners for the district.

Sir J. A. Simon, A.-G., and *W. Finlay, K.C.*, for the Commissioners of Inland Revenue, showed cause. There is no case for a writ of prohibition. The question is whether the additional Commissioners had jurisdiction to make the additional assessment. Whenever the Legislature confers jurisdiction upon a body, questions will arise as to the extent of the jurisdiction, and those questions must turn in the last resort upon the statute conferring the jurisdiction. Sometimes jurisdiction is conferred only when a state of things actually exists.

But as a general rule jurisdiction is conferred not conditionally upon the actual existence of a state of things, but upon information of the existence of a state of things. In such cases the decision of the question whether the state of things exists or not is part of the jurisdiction conferred upon the body, and then, provided the tribunal applies the proper test for the decision of the question, the superior Court does not interfere: *Brittain* v. *Kinnaird* (2); *Reg.* v. *Bolton* (3); *Allen* v. *Sharp* (4); *Brown* v. *Cocking* (5); *Elston* v. *Rose* (6); *Rex* v. *General Commissioners of Taxes for Clerkenwell.* (7)

In order to ascertain under which class a particular case falls the statute conferring the jurisdiction must be carefully considered. In the present case the jurisdiction of the additional Commissioners is conferred by s. 52 of the Taxes Management Act, 1880, which provides that if the surveyor discovers

(1) See note on p. 798, post.
(2) (1819) 1 Brod. & B. 432.
(3) (1841) 1 Q. B. 66.
(4) (1848) 2 Ex. 352.
(5) (1868) L. R. 3 Q. B. 672.
(6) (1868) L. R. 4 Q. B. 4.
(7) [1901] 2 K. B. 879.

1915

REX v. BLOOMSBURY INCOME TAX COMMISSIONERS.

that any person chargeable has not made a full and proper return the additional Commissioners are to make an additional assessment. The first question therefore is whether the surveyor has "discovered" that the applicant has not made a full and proper return. The meaning of the word "discover" as applied to the surveyor in this connection has been considered in *Rex* v. *Kensington Income Tax Commissioners.* (1) It means "come to the conclusion from the examination he makes and from any information he may choose to receive," per Bray J. (2), or "has reason to believe," per Avory J. (3), or "finds" or "satisfies himself," per Lush J. (4) This view of the meaning of the word has not been modified by the Court of Appeal. (5) When the surveyor "discovers" in this sense, then the jurisdiction of the additional Commissioners to make an additional first assessment comes into operation. In the present case it is plain that the surveyor has from perusal of the proceedings in the American Courts "discovered" that the applicant has not made a full and proper return; it follows that the additional Commissioners have not acted without jurisdiction.

But further, the surveyor has come to the proper conclusion on this matter. If it is possible in law for an individual to carry on a business through the agency of a limited company, the applicant in the present case carries on a business or adventure through the agency of Hooper & Jackson, Limited, and the Encyclopædia Britannica Company of Illinois. It is clear that an individual may so carry on a business: *Apthorpe* v. *Peter Schoenhofen Brewing Co.* (6) In *Gramophone and Typewriter Co.* v. *Stanley* (7) an English company carrying on business in the United Kingdom had acquired all the shares in a German company. Cozens-Hardy M.R. said (8): "I do not doubt that a person in that position"—i.e., in the position of the English company—"may cause such an arrangement to be entered into between himself and the company as will suffice to constitute the company his agent for the purpose of carrying on the

(1) [1913] 3 K. B. 870.
(2) [1913] 3 K. B. at p. 889.
(3) [1913] 3 K. B. at p. 897.
(4) [1913] 3 K. B. at p. 898.
(5) [1914] 3 K. B. 429, at p. 445.
(6) (1899) 4 Tax Cases, 41.
(7) [1908] 2 K. B. 89.
(8) [1908 2 K. B. at p. 96.

business, and thereupon the business will become, for all taxing purposes, his business. Whether this consequence follows is in each case a matter of fact." The fact in the present case has been found against the applicant and the rule for a prohibition ought to be discharged.

Austen-Cartmell, for the Bloomsbury Income Tax Commissioners.

Leslie Scott, K.C., and *A. M. Bremner*, for the applicant. The difficulty in the way of the Commissioners lies deeper than any they have attempted to answer. It lies at the very source of their jurisdiction. By s. 106 of the Income Tax Act, 1842, every person engaged in any trade, manufacture, adventure or concern, or any profession, employment, or vocation shall be chargeable by the respective Commissioners acting for the parish or place where such trade, &c., shall be carried on or where such profession, &c., shall be exercised. The Commissioners have made an assessment upon the applicant as carrying on business in the parish or place of Bloomsbury. If he was carrying on a business in Bloomsbury the Commissioners have jurisdiction, and consequently the additional Commissioners have jurisdiction; but if he was not carrying on business in Bloomsbury neither the Commissioners nor the additional Commissioners have any jurisdiction to assess him in that parish or place. Inferior tribunals whose jurisdiction depends upon the existence of certain facts cannot extend their powers merely by finding facts which would confer jurisdiction without evidence to support their finding: *Weaver* v. *Price* (1); *Liverpool Gas Co.* v. *Everton.* (2)

[LUSH J. referred to *Rex* v. *Bradford.* (3)]

There is no evidence that the applicant ever carried on business in Bloomsbury. He was a shareholder in a company which carried on business in that district, but that is not the same thing as carrying on business himself: *Salomon* v. *Salomon & Co.* (4) No other evidence is offered. The whole case for the Commissioners is based on the fact that the applicant is a shareholder in this company. The company has paid income tax under Sched. D and has deducted the tax from all dividends

(1) (1832) 3 B. & Ad. 409.
(2) (1871) L. R. 6 C. P. 414.
(3) [1908] 1 K. B. 365.
(4) [1897] A. C. 22.

1915

REX v. BLOOMSBURY INCOME TAX COMMISSIONERS.

paid to the applicant. This is really an attempt by the Commissioners to tax the applicant twice over. No one doubts that a limited company may carry on an agency business, but the business carried on by the company was not an agency business; it was not carried on at the mandate of the applicant or of anybody else. The business carried on was the business of the company. The applicant did not carry on any business in Bloomsbury and therefore was not assessable in Bloomsbury. Consequently a writ of prohibition will lie and is the appropriate remedy: *Rex* v. *Kensington Income Tax Commissioners.* (1)

Under the Income Tax Acts the jurisdiction to determine the facts upon which their jurisdiction depends is not given to the inferior tribunal. The income tax authorities are within the first part of the formula considered by Lord Esher M.R. in *Reg.* v. *Commissioners for the Special Purposes of the Income Tax* (2), and therefore, if they decide wrongly that the state of facts which gives them jurisdiction exists, what they do may be questioned, and it will be held that they have acted without jurisdiction. Lord Esher M.R. was wrong (although the question is not open in this Court) in deciding that the preliminary question was left to the inferior tribunal in that case. See also *Milward* v. *Caffin* (3); *Governors of Bristol Poor* v. *Wait.* (4) *Mayor of London* v. *Cox* (5) shows that there is no presumption in favour of the jurisdiction of the inferior Court to decide the preliminary question. In *Charleton* v. *Alway* (6) the language was more favourable to the construction that jurisdiction was given to the assessors than that of s. 106 of the Income Tax Act, 1842. The decision in *Allen* v. *Sharp* (7) was wrong unless it can be justified as turning upon the language of the particular statute under consideration in that case. This Court is very slow to hold that the inferior Court has jurisdiction to decide whether the preliminary state of facts exists upon which its jurisdiction to proceed depends, unless the jurisdiction to decide the preliminary question is plainly given to it by the statute. The

(1) [1913] 3 K. B. 870.
(2) (1888) 21 Q. B. D. 313, at p. 319.
(3) (1779) 2 W. Bl. 1330.
(4) (1834) 1 Ad. & E. 264.
(5) (1867) L. R. 2 H. L. 239.
(6) (1840) 11 Ad. & E. 993.
(7) 2 Ex. 352.

policy of this Court is to retain jurisdiction over the inferior Court: *Rex* v. *Bradford* (1); *In re North Western Rubber Co. and Hüttenbach & Co.* (2) *Brown* v. *Cocking* (3) is distinguishable and was wrongly decided. In *Elston* v. *Rose* (4) the county court judge misapplied the law. The judges of the Court of Queen's Bench used language which bears the meaning that although jurisdiction was given to the county court judge to determine the preliminary question the Court of Queen's Bench had power to review his decision if it thought it was against the weight of evidence. In *Liverpool Gas Co.* v. *Everton* (5) Keating J. said: "It certainly would seem strange that the power of the Court to interfere should depend upon the form of the proceeding; and I am not aware that any such distinction exists. Indeed Blackburn J. in *Elston* v. *Rose* (4) in terms says there is no such distinction, and that, where the Court below states facts which go to its jurisdiction, the superior Court has the same power to examine them whether on a motion for a prohibition or a mandamus." Those cases and *Allen* v. *Sharp* (6) and *Reg.* v. *Commissioners for Special Purposes of the Income Tax* (7) are the only instances where a preliminary question has been thought by a superior Court to have been left to an inferior Court. There is no case where a tribunal of local jurisdiction has been held to possess jurisdiction to determine whether a matter is within its local jurisdiction.

Neither s. 4 nor s. 106 of the Income Tax Act, 1842, gives the Commissioners any jurisdiction to determine whether a person is trading in the particular district. The Taxes Management Act, 1880, is a machinery Act, and a mere machinery enactment does not alter a right or an imposed tax: *Colquhoun* v. *Brooks* (8); *Rex* v. *General Commissioners of Taxes for Clerkenwell* (9); *Rex* v. *Kensington Income Tax Commissioners.* (10) There are no words in s. 52 of the Taxes Management Act, 1880, which give the inferior tribunal jurisdiction to decide whether a person is carrying on business within the jurisdiction. The judicial duty

(1) [1908] 1 K. B. 365.
(2) [1908] 2 K. B. 907.
(3) L. R. 3 Q. B. 672.
(4) L. R. 4 Q. B. 4.
(5) (1871) L. R. 6 C. P. 414.
(6) 2 Ex. 352.
(7) 21 Q. B. D. 313.
(8) (1889) 14 App. Cas. 493.
(9) [1901] 2 K. B. 879.
(10) [1913] 3 K. B. 870.

1915

REX v. BLOOMSBURY INCOME TAX COMMISSIONERS.

given to the Commissioners relates to the amount of the tax only. The fact that certain sections give a right of appeal is quite irrelevant to the question of the jurisdiction of the inferior tribunal. The decision in *Gramophone and Typewriter Co.* v. *Stanley* (1) shows that the business control of a company does not make the person or company having that control liable to income tax on the profits of the controlled company; it shows that a company does not in law carry on a business as the mere agent of an individual shareholder whatever may be the magnitude of his holding of shares in the company. That case is the guiding authority upon this question. [*Thompson* v. *Ingham* (2) and *Bunbury* v. *Fuller* (3) were also referred to.]

Sir J. A. Simon, A.-G., in reply. Upon the question of jurisdiction, the whole matter is decided by the judgment of Parke B. in *Allen* v. *Sharp* (4), that the assessment is final and conclusive unless disputed in the prescribed manner.

At the conclusion of s. 161 of the Income Tax Act, 1842, which in effect enacts that inspectors and surveyors are to have access to returns and assessments with liberty to amend and surcharge them, reference is made to 48 Geo. 3, c. 141, in that part of which entitled "No. IV." are six rules under the heading "Rules and Directions for making and collecting the Supplementary Assessments in each Year." Those rules provide a check against the vexatious abuse of the powers conferred on the inspector or surveyor. If he makes a vexatious charge he is, by r. 6, liable to a penalty. Sect. 18 of the Taxes Management Act, 1880, strongly confirms the view that the authority of the surveyor is not bounded by matters on which the High Court gives judgment. By that section security is given to the subject against vexatious or false charges or illegal practices on the part of the surveyor, who is made liable to a penalty of 100*l.* and to be discharged from his office. The statute 50 Geo. 3, c. 105, which is also referred to at the conclusion of s. 161 of the Income Tax Act, 1842, contains similar provisions. By s. 48 of the Income Tax Act, 1842, the assessors are to deliver notices at the houses of persons chargeable who are to prepare and deliver the declarations

(1) [1908] 2 K. B. 89.
(2) (1850) 14 Q. B. 710.
(3) (1853) 9 Ex. 111.
(4) 2 Ex. 352.

and statements required by the Act. It would be very strange if the authority of the assessor was limited to giving notice to persons actually chargeable, for the subject by merely making an affidavit that he was not chargeable would be able to avoid making the required declarations and statements. Sect. 22 of the Finance Act, 1907 (7 Edw. 7, c. 13), is an illustration of the use of the word "chargeable" in more senses than one. By that section every person on whom notice is served in the manner prescribed by s. 48 of the Income Tax Act, 1842, is to make a return of the profits "in respect of which he is chargeable" and in default is liable to a penalty which is reduced if he "proves that he was not chargeable to duties." The person who has to make the return as being a person "chargeable" includes a person whom the surveyor conceives is chargeable though it turns out that he is not chargeable, in which case he is only subject to the lesser penalty. The decision in *Allen* v. *Sharp* (1) is directly in point and the same principle is involved in many decisions, including *Cooper* v. *Cadwalader* (2), in the House of Lords, and *De Beers Consolidated Mines* v. *Howe*. (3)

It is not desired to abandon the point that prohibition will not lie to the Commissioners, but having regard to the decision in *Rex* v. *Kensington Income Tax Commissioners* (4) the point cannot be taken in this Court. [*Serjeant* v. *Dale* (5) was also referred to.]

Cur. adv. vult.

July 9. The following judgment was read by LORD READING C.J., who, after stating the facts, continued:—It is not disputed by the Crown that assessment of income tax can only be made upon those who are in fact chargeable under the statutes relating thereto. It is not disputed by the applicant that, if a person is chargeable to income tax under Sched. D, the Commissioners are the proper authorities to determine the issues of fact and of law relating to the assessment. The main question of controversy is whether in the circumstances the remedy

(1) 2 Ex. 352.
(2) (1904) 5 Tax Cases, 101.
(3) [1906] A. C. 455.
(4) [1913] 3 K. B. 870.
(5) (1877) 2 Q. B. D. 558.

1915

REX v. BLOOMSBURY INCOME TAX COMMISSIONERS.

Lord Reading C.J.

of the person who wishes to challenge any assessment made by the additional Commissioners is by appeal to the General Commissioners, or whether it is also open to him to proceed by way of prohibition and upon the evidence submitted obtain a decision of the Court that he is not in fact chargeable to income tax and that the Commissioners have therefore no jurisdiction to make, act, or proceed upon the assessment.

The applicant contends: (1.) that there is no jurisdiction in the Commissioners to make or proceed upon an assessment if the individual assessed is in fact not chargeable to income tax; (2.) that the Commissioners cannot give themselves jurisdiction to assess a person by determining in the first instance that he is chargeable when in fact he is not chargeable; (3.) alternatively, that if the additional Commissioners have jurisdiction to assess him in the first instance, the person assessed is not bound to challenge the decision by appeal to the General Commissioners, but can, at his option, take proceedings by prohibition; (4.) that the information before the surveyor did not in fact or in law afford ground for his discovery that the applicant was chargeable; (5.) that the evidence now before the Court establishes that the applicant did not in fact carry on business within the district or as alleged and that he is not a person chargeable to income tax under Sched. D; and (6.) that if the Court should find itself unable to arrive at conclusions of fact on the affidavits now submitted, it should direct pleadings in prohibition to determine the issues.

The Attorney-General contends: (1.) that it is for the assessing authorities to decide in the first instance whether the applicant is chargeable to income tax; (2.) that if the surveyor has honestly come to the conclusion upon the information in his possession that the applicant has not made a full and proper return to income tax, and the additional Commissioners have thereupon made an additional assessment upon him, this assessment is binding unless challenged by the means prescribed under the statutes; and (3.) that the decision of the additional Commissioners can only be challenged by an appeal to the General Commissioners (s. 57, sub-s. 3, of the Taxes Management Act, 1880), whose decision is final, subject to the right of

the person assessed to require the statement of a case to the High Court upon questions of law (s. 59, sub-s. 1, of the Taxes Management Act, 1880).

The view submitted by the Crown is that the Legislature has entrusted the decision of the facts and the law, subject to the statement of a case, to the General Commissioners, and that on a challenge of the jurisdiction of the additional Commissioners to make the assessment it is for the General Commissioners to decide upon the material before them whether the individual is or is not chargeable to income tax. Their decision, it is said, is final upon the facts but is open to review by the High Court upon a case stated.

Our judgment in this case must depend upon the meaning we attribute to the language of certain sections of the statutes relating to income tax. By s. 52 of the Taxes Management Act, 1880, "If the surveyor discovers that any properties or profits chargeable to the duties have been omitted from such first assessments, or that any person so chargeable has not made a full and proper or any return, or has not been charged to the said duties, or has been undercharged in the said first assessments, or has obtained and been allowed from and in such first assessments any allowance, deduction, abatement, or exemption not authorised by the Tax Acts, then" under sub-s. 2, as regards duties chargeable under Sched. D, the additional Commissioners shall make an additional first assessment on any such person in such sum as they think ought to be charged on him subject to objection by the surveyor and to appeal. What meaning is to be given to the word "discovers" in the section? Is it sufficient that the surveyor honestly arrives at the conclusion based upon the material then before him that the applicant carried on business with Jackson within the district and therefore had not made a full and proper return under Sched. D? Or must the facts be established by sufficient legal evidence to justify the conclusion of the surveyor? This question was decided in *Rex* v. *Kensington Income Tax Commissioners.* (1) Bray J. was of opinion that the words "if the surveyor discovers" mean "if the surveyor comes to the conclusion from the examination he

(1) [1913] 3 K. B. 870.

1915

REX v. BLOOMSBURY INCOME TAX COMMISSIONERS

Lord Reading C.J.

makes and from any information he may choose to receive"; Avory J. thought that the word "discovers" in this section means "has reason to believe"; Lush J. took the word as equivalent to "finds" or "satisfies himself." Although the decision in the case was reversed by the Court of Appeal, the reversal was upon other grounds, and no doubt was expressed as to the interpretation given to the words in question. In fact Pickford L.J. said that he saw no reason to dissent from the above views expressed in the Divisional Court. I think the decision in that case goes a long way to support the contention of the Crown in the present case. Mr. Leslie Scott on behalf of the appellant conceded, for the purpose of the hearing before this Court, that he must accept that decision whilst reserving the right to challenge it elsewhere, and he dealt with the present case on that basis.

It was also decided by the Court of Appeal in that case that prohibition will lie and is an appropriate remedy if the Commissioners have acted without jurisdiction. The Commissioners for Kensington had assessed, in respect of gains and profits from foreign possessions, the person who was in law assessable by the Commissioners for the city of London only. It was held that the Commissioners for Kensington had no jurisdiction to assess him, and the Court granted the prohibition.

The main question in this case depends not so much upon the Taxes Management Act, 1880, as upon the Income Tax Acts, for the jurisdiction to charge the tax is derived from the last mentioned statutes. The Act of 1880 consolidated various enactments relating to income tax and other taxes under the management of the Board of Inland Revenue. It conferred certain powers upon Commissioners to make assessments but did not give jurisdiction to charge a person who was not otherwise chargeable to income tax. Until 1880 the machinery for putting the Income Tax Acts into operation was provided by the statute 43 Geo. 3, c. 99, and amending statutes, including the House Tax Act, 1803 (43 Geo. 3, c. 161). These Acts were incorporated in the Income Tax Act, 1842, by s. 3 and continued to govern the operation of income tax law until the Taxes Management Act, 1880. An examination of the two statutes of 1803 shows that when the assessing

authorities of the district were empowered to assess persons chargeable, they were empowered to assess such persons as were "discovered" to be chargeable, i.e., such persons as the assessing authorities bona fide believed on the materials before them to be chargeable. The person so charged had a right of appeal to the Commissioners, whose decision was final except in certain cases when the opinion of the judges might be required. (See ss. 9, 21, 24 to 27, and 29 of 43 Geo. 3, c. 99, and ss. 63, 69, 70 and 73 of 43 Geo. 3, c. 161.) An examination of the Income Tax Act, 1842, shows that its provisions are to the same effect. By s. 48 it is provided that the assessors shall give notice to every person chargeable to the duties, requiring him to deliver a statement, and imposing a penalty in default. By s. 22 of the Finance Act, 1907 (7 Edw. 7, c. 13), the penalty is limited in the case of a person who proves that he is not chargeable to the duties, but every person upon whom notice is served is required to make the return under Scheds. E and D, whether he is or is not chargeable with duty. A person chargeable under s. 48 of the Act of 1842 cannot therefore mean a person whose liability is not in dispute. It includes a person who is in fact not chargeable but is believed by the assessing authorities to be chargeable. By s. 52 of the Act of 1842 every person chargeable shall when required deliver a statement of the annual value of properties and the amount of profits liable to duty. Sect. 106 shows in what districts the duties are to be charged. Sects. 111 and 113 give power to the additional Commissioners to consider the returns made and to make an assessment where no statement or an insufficient statement is returned. The inspector or surveyor may examine the assessment made by the additional Commissioners and require amendment by the additional Commissioners of any error he may discover and certify to them (s. 115). Any person aggrieved by an assessment made by the additional Commissioners may appeal to the General Commissioners (s. 118). Sect. 161, which is applicable to all schedules under the Act, gives power to the inspector or surveyor to inspect and examine all returns and assessments and to amend them and make surcharges, and if he "shall find or discover" that a person "who ought to be charged" has not been charged or shall have been

1915

REX v. BLOOMSBURY INCOME TAX COMMISSIONERS.

Lord Reading C.J.

underrated, or that a person liable to the duties has not made a return, he shall certify in writing the amount of surcharge in manner prescribed. The person surcharged was thus brought under direct obligation to pay the tax, subject to his right of appeal under the Assessment of Taxes Act, 1808 (48 Geo. 3, c. 141). The surveyor may be mistaken in the "discovery," but if there is information before him upon which he could and did honestly believe the person to be liable to the duties the only remedy is by the appeal prescribed by the statutes. The Taxes Management Act, 1880, now regulates the machinery of assessment and of appeals, and the surveyor may examine the returns and the first assessments and the additional Commissioners may make an additional first assessment as prescribed by ss. 51 and 52 of that Act. The Legislature has given jurisdiction to the Commissioners to determine the facts and to confirm the assessments.

But on behalf of the applicant it is said that the Commissioners cannot give themselves jurisdiction by a wrong decision on the facts. Lord Esher M.R. considered that formula in *Reg.* v. *Commissioners for Special Purposes of the Income Tax* (1) and said: "When an inferior Court or tribunal or body, which has to exercise the power of deciding facts, is first established by Act of Parliament, the Legislature has to consider what powers it will give that tribunal or body. It may in effect say that, if a certain state of facts exists and is shown to such tribunal or body before it proceeds to do certain things, it shall have jurisdiction to do such things, but not otherwise. There it is not for them conclusively to decide whether that state of facts exists, and, if they exercise the jurisdiction without its existence, what they do may be questioned, and it will be held that they have acted without jurisdiction. But there is another state of things which may exist. The Legislature may entrust the tribunal or body with a jurisdiction, which includes the jurisdiction to determine whether the preliminary state of facts exists as well as the jurisdiction, on finding that it does exist, to proceed further or do something more. When the Legislature are establishing such a tribunal or body with limited jurisdiction, they also have to consider, whatever jurisdiction they give them,

(1) 21 Q. B. D. 313, at p. 319.

whether there shall be any appeal from their decision, for otherwise there will be none. In the second of the two cases I have mentioned it is an erroneous application of the formula to say that the tribunal cannot give themselves jurisdiction by wrongly deciding certain facts to exist, because the Legislature gave them jurisdiction to determine all the facts, including the existence of the preliminary facts on which the further exercise of their jurisdiction depends; and if they were given jurisdiction so to decide, without any appeal being given, there is no appeal from such exercise of their jurisdiction." In my judgment this dictum states accurately the principle applicable to such cases.

The last question is, within which class should the present case be placed? *Allen* v. *Sharp* (1) is a decision which appears to me in point and is based upon those sections of the Acts of 43 Geo. 3, c. 99 and c. 161, to which I have already referred. Parke B. (2) draws the distinction between the case then under consideration and cases under the statutes relating to poor rate (see *Weaver* v. *Price* (3)), and his observations are so important and bear so immediately upon the present case that I quote them in extenso: "On a careful consideration of these Acts of Parliament, they seem to me to differ from the Statute of Elizabeth (4), as to poor rate, and that the Legislature intended that the assessment of the assessors appointed by the Commissioners should be final and conclusive, unless appealed from, in the first place, to the Commissioners, and further, if necessary, to the judges of the superior Courts. It would be singular if there were no such provision; for, what a flood of litigation would follow, if every subject of the Crown, who was dissatisfied with the judgment of the assessors, had a right to dispute the propriety of their assessment in an action against the collectors. . . . . Without referring to the statutes, I should say, a priori, that the object of the Legislature was to make the decision of the assessor final and binding, unless disputed in the manner pointed out. On reading the statutes, I come to the same conclusion. By the 9th section of the 43

(1) 2 Ex. 352.
(2) 2 Ex. at p. 363.
(3) 3 B. & Ad. 409.
(4) Poor Relief Act, 1601 (43 Eliz. c. 2).

1915

REX v. BLOOMSBURY INCOME TAX COMMISSIONERS.

Lord Reading C.J.

Geo. 3, c. 99, the Commissioners are to meet and appoint assessors, who are to bring in their certificates of assessments verified on oath; and the assessors are thereby 'required, with all care and diligence, to charge and assess themselves and all other persons chargeable with the said duties.' If the language had been 'to charge and assess all such persons as they honestly and bona fide, after due care and diligence, believed to be chargeable,' their assessment would, beyond all question, be final," and he found that under statutes 43 Geo. 3, c. 99 and c. 161, the only remedy was by appeal to the Commissioners. It was argued in that case that the Legislature meant that the decision should be final only in respect of such persons as were liable to be rated but were rated for too much. Parke B. held that the word ought not to receive so narrow a construction and that it meant in these statutes rating when the party ought not to be rated at all. No such question can now arise, as by s. 57, sub-s. 3, of the Taxes Management Act, 1880, the right of appeal to the Commissioners is given to any person aggrieved by an assessment. In my judgment the decision and reasoning of Parke B. and the other learned judges have a direct bearing upon the present application for prohibition.

In my view an examination of the Income Tax Acts shows that the scheme of the Legislature is to entrust the decision of the facts to a tribunal of persons specially selected for the locality, and who are often in a better position than the Courts to determine the questions of fact, sometimes very complicated, which may arise. The exigencies of the State require that there should be a tribunal to deal expeditiously and at comparatively little expense with all such questions and to decide them finally, reserving always to the individual the right to have the Commissioners' decisions on points of law reviewed by the Courts. The obligation is placed, for reasons of expediency, upon the person assessed to appeal to the Commissioners if he wishes to rid himself of an assessment which is, in his view, based upon wrong conclusions of fact, and this obligation rests equally upon a person who contends that he is not chargeable as upon a person who admits that he is chargeable but not to the extent of the assessment made upon him.

I am therefore of opinion that it is for the Commissioners to decide whether or not a person assessed by the additional Commissioners, after "discovery" by the surveyor, is in fact chargeable. But there must be information before the surveyor which would enable him, acting honestly, to come to the conclusion that a person is chargeable. It is contended in this case that the materials before the surveyor not only did not justify his conclusion but in fact disproved it, and that the surveyor had manifestly arrived at his conclusion by taking a wrong view of the law as laid down in *Salomon* v. *Salomon & Co.* (1) and other cases to the same effect, and that he had treated the applicant and Jackson as if they were the companies carrying on the business of the companies for themselves and not for the companies.

Undoubtedly there are difficult questions of fact and of law raised in the proceedings in the American Courts which require careful examination. If the companies were in fact acting as agents for and carrying on the business of the partnership of Hooper and Jackson the applicant would be liable to income tax in respect of the profits and gains made by the firm. Whether the companies were agents for the partnership or not must be decided according to the facts. I am not satisfied that the surveyor must have acted upon a wrong view of the law in arriving at his conclusions. Moreover there was information before the surveyor in the American proceedings that the applicant and Jackson "were also from time to time engaged in other joint enterprises and business operations in the profits and losses of which they were equally entitled to share," and in support of this statement reliance was placed upon the agreement of October 28, 1906, between Arthur Fraser Walter of the one part and Hooper and Jackson of the other part. The applicant and Jackson are there described as "publishers" of 125, High Holborn. The agreement deals partly with the publication and sale of certain editions of the Encyclopædia Britannica and with the accounts between the parties relating thereto. There are various clauses in the agreement which appear to establish prima facie that the applicant and Jackson were at the date of

(1) [1897] A. C. 22.

1915

REX v. BLOOMSBURY INCOME TAX COMMISSIONERS.

Lord Reading C.J.

the agreement carrying on and intending to carry on a partnership business at 125, High Holborn. In my judgment the surveyor had therefore material before him upon which he could come to the conclusion that there was a partnership between the applicant and Jackson at 125, High Holborn, apart altogether from the difficult questions relating to the companies, and that the additional Commissioners had jurisdiction to assess the applicant in respect of such partnership. Once that conclusion is reached, it follows that they had jurisdiction to decide all questions of fact relating to the assessment of the partnership. This proposition is really not in dispute and indeed it has been affirmed in *Rex* v. *General Commissioners of Taxes for Clerkenwell* (1), where it was held that in these circumstances the applicant's remedy is by appeal and not by prohibition. An argument closely resembling that of the present applicant was there advanced in support of an application for prohibition against the Commissioners. It was there contended that the Commissioners had only acquired jurisdiction to assess the duty by an erroneous finding of facts and therefore that the prohibition should issue, but the Court of Appeal discharged the rule. They held that the remedy was by appeal on the ground that there was jurisdiction to charge a trader in respect of the whole profits of his trade if he is found within the district carrying on the trade in part, and that they had jurisdiction to decide all questions of fact necessary for making the full assessment and, therefore, to determine the true extent of the trade (per Stirling L.J. (2)).

It is worthy of observation that if the applicant's main contention is right it would have been open to the subject to proceed by prohibition in numerous and important cases in income tax law which have been decided by the Courts and the House of Lords upon a case stated by the Commissioners and in which it has been assumed that the only remedy of the subject who disputes his liability is by appeal to the Commissioners and by a case stated on points of law.

I am of opinion that the Crown's contentions are right and that the rule should be discharged with costs.

(1) [1901] 2 K. B. 879. (2) [1901] 2 K. B. at p. 895.

1915

REX v. BLOOMSBURY INCOME TAX COMMISSIONERS.

The following judgment was read by AVORY J.:—In this case an assessment under the third rule (first and second cases) under the heading "Schedule D" in s. 100 of the Income Tax Act, 1842, has been made by the additional Commissioners for the division of St. Giles-in-the-Fields and St. George, Bloomsbury, purporting to act under s. 52 of the Taxes Management Act, 1880, on Horace Everett Hooper and Walter Montgomery Jackson, described as carrying on trade at 125, High Holborn. The applicant, Horace Everett Hooper, has obtained a rule for a prohibition to the said Commissioners and to the General Commissioners for the said district on the ground that the said Commissioners had no jurisdiction to make the assessment or to proceed on or in respect to the same, and in support of his application has filed an affidavit denying that he had at the material time any office or place of business or that he had at such material time been engaged in or carried on any trade, manufacture, adventure, or concern within the district of the said Commissioners.

It is contended on behalf of the applicant that he is not a person chargeable to the duties within the meaning of s. 52 of the Act of 1880, that neither the surveyor nor the additional Commissioners had jurisdiction to decide that he was so chargeable or to make an assessment upon him, and that the Court should upon the material now before it either make the rule absolute, or direct an issue to determine upon pleadings in prohibition whether he was so chargeable. In showing cause against the rule the Crown has placed before the Court the information, or some of it, upon which the surveyor and the Commissioners have acted, and the Attorney-General contends that the surveyor has in the circumstances, within the meaning of s. 52, discovered that a person chargeable to the duties has not made a return, that the additional Commissioners had jurisdiction thereupon to make the assessment, and that the applicant's remedy, if aggrieved, is by appeal to the General Commissioners under s. 57, sub-s. 3, and, if necessary, by special case to be stated for the opinion of this Court under s. 59 of the Act of 1880.

We have listened to an elaborate argument ranging over the

1915

REX v. BLOOMSBURY INCOME TAX COMMISSIONERS.

AVORY J.

whole field of income tax law and of the jurisdiction of this Court over inferior Courts or tribunals.

In my opinion the whole argument resolves itself into the single question whether s. 52 is to be construed as limited in its operation to a person who in the judgment of this Court is in fact and in law chargeable to the duties, or whether it applies to a person whom the surveyor honestly has reason to believe is so chargeable. This Court has decided in *Rex* v. *Kensington Income Tax Commissioners* (1) that the expression "if the surveyor discovers" in s. 52 does not mean ascertains by legal evidence. My brother Bray said that it means "if he comes to the conclusion on the information before him." My brother Lush said that it means "if he is satisfied," and I said that it means "if he has reason to believe."

This interpretation of the word "discovers" is accepted in the argument for the applicant, but it is contended on his behalf that it can only be applied to a person who in fact and in law is chargeable, and that if, as in the present case, the liability to be charged is disputed, the Court ought either to grant the prohibition on the materials before it or direct an issue to determine the fact.

It is to be observed that the power and duty of the surveyor under s. 52 extend equally to persons chargeable to the duties who have not made a full and proper return or who have not made any return or who have obtained and been allowed exemption not authorized by the Tax Acts. In the latter case they are persons who claim not to be chargeable to the duties by reason of the fact that they are entitled to exemption, but if the surveyor discovers, i.e., has reason to believe, that such a person is not entitled to exemption, he thereby discovers that he is chargeable, and the additional Commissioners are thereupon authorized and directed under s. 52, sub-s. 2, to make an assessment upon him subject to objection by the surveyor and to appeal to the General Commissioners.

This view of the latter part of the section is confirmed by reference to s. 164 of the Income Tax Act, 1842, relating to exemption, which enacts that "in case the . . . . surveyor shall

(1) [1913] 3 K. B. 870.

object to any such claim as aforesaid in writing, suggesting to the said additional Commissioners that he hath reason to believe that the income of such claimant . . . . is not truly . . . . set forth . . . . then . . . . the merits of such claim for exemption shall be heard and determined upon appeal before the Commissioners for General Purposes . . . ."

If the surveyor may discover that a person who has claimed and been allowed total exemption is not entitled to it and is therefore chargeable, it appears to me to follow that he may likewise discover that a person who has made no return is chargeable. The argument for the applicant that the surveyor has no jurisdiction to discover, and the additional Commissioners no jurisdiction to make an assessment, unless the person assessed is in fact and in law chargeable to the duties, appears to me, assuming the interpretation placed by the Court in *Rex* v. *Kensington Income Tax Commissioners* (1) on the word "discovers" to be correct, to involve the proposition that no one can honestly be satisfied of, or have reason to believe, anything which is not in fact true.

In my opinion the whole scheme of the legislation in the Income Tax Act, 1842 (incorporating as it does the earlier Acts 43 Geo. 3, c. 99, and 43 Geo. 3, c. 161), and the Taxes Management Act, 1880, brings this case within the category of cases referred to by Lord Esher in *Reg.* v. *Commissioners for Special Purposes of the Income Tax* (2), where the Legislature has entrusted the tribunal or body with a jurisdiction which includes the jurisdiction to determine whether the preliminary state of facts exists, as well as the jurisdiction on finding that it does exist, to proceed further or do something more.

In such a case it is an erroneous application of the formula to say that the tribunal cannot give themselves jurisdiction by wrongly deciding certain facts to exist, because the Legislature gave them jurisdiction to determine all the facts including the existence of the preliminary facts on which the further exercise of their jurisdiction depends—see also *Colonial Bank of Australasia* v. *Willan* (3)—and the principle of law to be applied to this case is

(1) [1913] 3 K. B. 870.
(2) 21 Q. B. D. 313, at p. 319.
(3) (1874) L. R. 5 P. C. 417, at pp. 442, 443.

1915

REX v. BLOOMSBURY INCOME TAX COMMISSIONERS.

Avory J.

that laid down by Tindal C.J. in *Cave* v. *Mountain* (1) (approved and adopted by Lord Denman C.J. in *Reg.* v. *Bolton* (2)), where he says, dealing with a question of the jurisdiction of magistrates, "But if the charge be of an offence over which, if the offence charged be true in fact, the magistrate has jurisdiction, the magistrate's jurisdiction cannot be made to depend upon the truth or falsehood of the facts, or upon the evidence being sufficient or insufficient to establish the corpus delicti brought under investigation," and that the remedy for any person aggrieved by an assessment made under s. 52 either by reason of his not being chargeable at all, or by reason of it being excessive, is by appeal to the General Commissioners and by special case.

In support of this view of the scheme of the legislation ss. 9, 12, 21, 24, 25, 26, 27, and 29 of 43 Geo. 3, c. 99, and ss. 63, 69, 70, and 73 of 43 Geo. 3, c. 161, ss. 3, 48, 111, 113, 114, 115, 118, 161, 162, and 164 of the Act of 1842, s. 22, sub-s. 1, of the Finance Act, 1907, and ss. 57, 58, and 59 of the Taxes Management Act, 1880, may be referred to.

I am further of opinion that the question in dispute is concluded by the decision of the Court of Exchequer in *Allen* v. *Sharp* (3) Parke B. in that case said (4): "If the language had been, 'to charge and assess all such persons as they honestly and bona fide, after due care and diligence, believed to be chargeable,' their assessment would, beyond all question, be final."

This is the very language of s. 52 of the Act of 1880 as interpreted by the Court in *Rex* v. *Kensington Income Tax Commissioners* (5), and Parke B. further said in *Allen* v. *Sharp* (6): "An assessment not appealed from stands precisely in the same situation as one confirmed after appeal."

It is true that that case was decided under the statutes of George III., but the reasoning is equally applicable to the statutes of 1842 and 1880, and the right of appeal which was in question in that case, being limited to a person overcharged or overrated, is by the Act of 1880 extended to any person aggrieved by an assessment. Much reliance was placed in the argument for the

(1) (1840) 1 Man. & G. 257.
(2) (1841) 1 Q. B. 66, at p. 75.
(3) 2 Ex. 352.
(4) 2 Ex. at p. 364.
(5) [1913] 3 K. B. 870.
(6) 2 Ex. at p. 366.

applicant, particularly by Mr. Bremner, on s. 106 of the Act of 1842 and the decision of the Court of Appeal in *Rex* v. *Kensington Income Tax Commissioners* (1), and it was contended that the jurisdiction of the Commissioners under this section could only attach to a person who was in fact shown to be engaged in trade, adventure, &c., in their district, but in my opinion this section and the decision of the Court of Appeal only provide for and determine the particular Commissioners by whom the assessment is to be made in the various cases mentioned in the section and do not carry the argument any further.

It is admitted that if any Commissioners have jurisdiction in this case the respondent Commissioners for the district where the office 125, High Holborn is situate are the proper ones to make the assessment.

For these reasons I come to the conclusion that the surveyor has jurisdiction to "discover" and the additional Commissioners have jurisdiction to make an assessment in a case where the person charged denies that he is carrying on trade in the district and disputes any liability to the duties, and the question remains to be considered whether in this particular case there is any ground for saying that the additional Commissioners have exceeded or that the General Commissioners are about to exceed their jurisdiction.

The Court of Appeal having decided that prohibition will lie to the Commissioners at this stage, I think it might be the duty of the Court to interfere if it were shown that they had proceeded or were about to proceed on any erroneous view of the law, but having come to the conclusion which I have already expressed, it appears to me that in the present case such a contention can only succeed if it were shown that there were no grounds upon which the surveyor or the Commissioners could honestly have believed that the applicant was chargeable, and in my opinion, although there may be difficult questions of fact and of law to be determined upon an appeal to the General Commissioners, and, if necessary, upon a special case to be stated by them, it is impossible to say that the surveyor and the additional Commissioners may not upon the material before them have honestly come to

(1) [1914] 3 K. B. 429.

1915

REX v. BLOOMSBURY INCOME TAX COMMISSIONERS.

Avory J

the conclusion that the applicant was chargeable and that the assessment was just and proper, and there is no ground at this stage for suggesting that the General Commissioners on appeal would not decide the disputed questions according to law.

The Attorney-General has directed the attention of the Court to the practical inconvenience which would result if the contention of the applicant were upheld, and which is referred to by Parke B. in his judgment in *Allen* v. *Sharp* (1), and to the fact that in the several reported cases, many of which have been carried on appeal to the House of Lords and decided on special cases stated by the General Commissioners, the point now taken that prohibition would lie has never before been suggested, but in the view which I take of the construction of the statutes I have not deemed it necessary to have recourse to these considerations.

In my judgment the rule ought to be discharged.

The following judgment was read by LUSH J.:—The question whether the applicant is entitled to the prohibition which he claims depends upon the proper answer to be made to these two questions: (1.) Has the Legislature enacted expressly, or by implication, that the surveyor on whose motion the additional Commissioners act, or the additional Commissioners themselves, or the General Commissioners on appeal, are to finally determine the question of fact whether the person alleged to have carried on a business has in fact carried it on and is chargeable in that capacity? (2.) Has the surveyor, in ascertaining that the applicant carried on business, and have the additional Commissioners, in assessing the applicant on that footing, acted without any real ground and made a mistake of law? I quite agree with Mr. Leslie Scott and Mr. Bremner when they said that if the Legislature has not conferred the jurisdiction of finally determining this question upon the authorities to whom I have referred, or one of them, this Court must determine it, either upon the affidavits, or, if the case requires it, by directing an issue in the form of a declaration in prohibition, and if it appears that the applicant has not in fact carried on business,

(1) 2 Ex. 352.

1915

REX v. BLOOMSBURY INCOME TAX COMMISSIONERS.

Lush J.

then we ought to grant the prohibition. This seems to me to be clear because the jurisdiction to make the additional assessment and to act upon it only arises if the business has been carried on and the person assessed is chargeable, and this Court alone can decide whether those conditions have been fulfilled if the Legislature has not given this jurisdiction to the inferior tribunal. That prohibition lies to the Commissioners has been decided by the Court of Appeal in *Rex* v. *Kensington Income Tax Commissioners*. (1) Whether the applicant is right in saying that he is entitled to the prohibition because the surveyor and the additional Commissioners have made a mistake in law I will consider later.

Now the contention of the Attorney-General is that the authority on whom this jurisdiction has been conferred is the General Commissioners on appeal, and that the scheme of the legislation is that if the surveyor of any district discovers, i.e., satisfies himself or believes (as this Court decided in *Rex* v. *Kensington Income Tax Commissioners* (2)), that a person in his district has carried on business, then he may so report, and the additional Commissioners may then assess him, and his remedy, if he feels aggrieved, is to appeal to the General Commissioners, who have jurisdiction finally to determine the facts, with power to state a case for the decision of this Court. Whether this view is right depends entirely upon the construction of the Income Tax Act, 1842, and the Taxes Management Act, 1880. We had a very full discussion—not unnecessarily I think—as to the various sections of these Acts and also of the earlier Acts of George III. which have been replaced by the Taxes Management Act, 1880, the machinery Acts, as the Attorney-General called them, regulating the procedure to be followed in collecting the tax. If it had not been for the fact that we are dealing with statutes for the collection of income tax, to which special considerations are applicable, and for the judgments delivered in the case of *Allen* v. *Sharp* (3) on which the Attorney-General relied, I should have come to the conclusion that Mr. Leslie Scott and Mr. Bremner had made good their contention

(1) [1914] 3 K. B. 429. (2) [1913] 3 K. B. 870.

(3) 2 Ex. 352.

1915

REX v. BLOOMSBURY INCOME TAX COMMISSIONERS.

Lush J.

that on a fair construction of the statutes the Legislature had not conferred this jurisdiction upon the General Commissioners or upon the surveyor or the additional Commissioners. My view as to the Income Tax Act, 1842, is that it does not sufficiently indicate an intention to confer the jurisdiction upon the assessing authority or upon the surveyor. It is unnecessary, I think, to go through any of the sections. It is sufficient to say that they appear to me to proceed upon the footing that it is only if a person has in fact carried on a business or is otherwise chargeable that he is under any duty to make a return or is subject to the liability of being assessed and compelled to pay the tax, and that in that Act the mode in which this question is to be determined is not considered. If that is so, the applicant, so far as that Act is concerned, could, in my opinion, ask this Court to determine the fact, and, if we found that no business had in fact been carried on, to prohibit the authorities from proceeding on the assessment. Mr. Bremner in the course of his argument pointed out that notices have to be affixed in the place where the business is being carried on, which are treated as good notice to the trader, and he contended that that shows that it is only where in truth and in fact the business has been carried on that any obligation can arise, so that he argued that the applicant must be at liberty to show that he did not carry it on, otherwise he would be bound by a notice which could never have come to his knowledge. I think that the Attorney-General answered that argument when he pointed out that it still leaves open the question who is to determine the question of fact. If the General Commissioners are to determine it, and if they do determine that he carried on the business there, we must treat the decision as correct and there is no grievance. If they determine that he did not carry it on, he equally is not injured.

When one turns to the Taxes Management Act, 1880, the question is not so clear; but here again I think that, giving the strict and ordinary meaning to the language used in s. 52, which is the section on which reliance is largely placed, the natural inference would have been, but for the considerations to which I have referred, that it is only if a person has carried on business in fact, and is chargeable on that ground, that the surveyor and

the additional Commissioners can act; in other words, that there is a condition precedent to the exercise of the authority of the surveyor and the Commissioners, namely, that the person is chargeable because he has carried on business in the district, and that the determination of this preliminary question has not been left to the surveyor or the Commissioners or to the General Commissioners on appeal. I cannot, however, say that s. 52 is not reasonably capable of the other meaning. The words used in the section are, in my opinion, capable of being read in one of these two ways: either as indicating that the discovery of the surveyor applies to the whole of the facts mentioned in it, including the fact that the person in question is chargeable as a person who has carried on business; or as indicating that a person who is chargeable at all to income tax (which this applicant is) is subject to the exercise of the power of the surveyor and the additional Commissioners. Now if the section is capable of being read in the way contended for by the applicant or in the way contended for by the Crown, one must consider what the consequences are of adopting one or the other construction, and here one has to carefully consider the judgments, to which I have already referred, in *Allen* v. *Sharp*. (1) In that case a person was assessed by the surveyor, acting under the statutes 48 Geo. 3, c. 55, and 52 Geo. 3, c. 93, for which the Taxes Management Act, 1880, has since been substituted, to the tax leviable on persons carrying on business as horse dealers. He did not pay and his goods were seized. He brought an action of replevin asserting that he was not carrying on business as a horse dealer and was not subject to the tax, thereby challenging the jurisdiction of the Commissioners to assess him or to enforce the assessment, as their jurisdiction is questioned in this case by the application for prohibition. The Court held that having regard to the peculiar incidents of the Income Tax Acts the intention of the Legislature, to be gathered from the terms of the statutes, was that the assessors appointed by the Commissioners should have power to decide whether he came within the class of horse dealers, the remedy of the person assessed being to appeal to the General Commissioners. Parke B.

(1) 2 Ex. 352.

1915.

REX v. BLOOMSBURY INCOME TAX COMMISSIONERS.

Lush J.

in delivering judgment pointed out (1) the flood of litigation that would follow "if every subject of the Crown who was dissatisfied with the judgment of the assessors had a right to dispute the propriety of their assessment in an action against the collectors. Actions would be innumerable, juries would have to decide on facts without end, judges on law, and cases would be carried to the highest tribunal when the exigencies of the statute required speedy determination." Now the language of the statutes under which the surveyor and the Commissioners acted in that case was no doubt not the same as the language used in the Taxes Management Act, 1880, which has replaced them, nor is the nature of the tax payable in that case identical with that of the tax payable in this, and the decision therefore is not necessarily binding on us who have to interpret the latter Act. But the question which I think we have to ask ourselves is whether, bearing in mind that when the latter Act was passed it had been declared that the tribunal to decide whether a person was carrying on a particular business was the authority who made the assessment and not this Court, the changed language indicates that the Legislature intended to change the whole scheme and incidents of the legislation with regard to the assessment and collection of taxes of this kind and to alter the tribunal who had to decide the preliminary question whether the business was in fact carried on. I cannot think that that was intended. If the language used in the amending Act is reasonably capable of being so construed as to leave the procedure substantially as it was, as I think it is, we ought, in my opinion, so to construe it. It is in that view, I think, that we ought to approach and deal with this question. The inconvenience which would arise, as Parke B. pointed out, if it was held that the Commissioners had no power to decide whether a person is chargeable is very serious. As the Attorney-General pointed out, there may be proceedings in prohibition and appeals and ultimately, if it is held that there was jurisdiction to make the assessment, a hearing before the General Commissioners and possibly fresh proceedings on a case stated. The income tax might be ultimately collected, it may be a

(1) 2 Ex. at p. 363.

year or two years after the financial year for which it was required has expired.

Having regard to these considerations and bearing in mind that when the Taxes Management Act, 1880, was passed the question whether a particular person was chargeable as coming within the specified class of traders was determinable by the authority who made the assessment, I have come to the conclusion that s. 52 ought to be read in the way contended for by the Crown. I therefore think that the surveyor has jurisdiction to report if he "discovers" that a person is chargeable, and the additional Commissioners have power then to assess, and that if the person assessed is aggrieved his only remedy is to appeal. The facts can then be ascertained. If there is no evidence to justify the assessment and the General Commissioners go wrong in holding that there is, or if they make any other mistake in law, their decision can be set right by appeal on a case stated, or possibly then by prohibition.

It remains to consider whether the second contention of the applicant is well founded, i.e., whether it is true to say that the surveyor in this case had no ground for his alleged "discovery" and has made a mistake in point of law, and, if so, whether we can and ought to prohibit on that ground. The applicant contends that the whole foundation of the alleged discovery is that he and Mr. Jackson, his alleged partner in the business, controlled and were interested as shareholders in two limited companies, one registered in England and the other in the State of Illinois, and that it is a wrong contention in law to say, as the surveyor in effect says, that persons who control a limited company, owning all or substantially all the shares, carry on the business through the company as their agents. There are, I think, two answers to this contention. The first is that the Crown alleges here (and the surveyor has so "discovered" or satisfied himself) that the applicant and Mr. Jackson have carried on a separate business in addition to that nominally carried on by the two companies, and certain documents are in evidence which at all events give some colour to that contention. I do not see how we can determine that there was in law no ground for the discovery or belief of the surveyor while this allegation as to

1915

REX v. BLOOMSBURY INCOME TAX COMMISSIONERS.

Lush J.

the separate business remains undisposed of. There is some prima facie ground for the report of the surveyor that such a business was carried on, and that is, in my opinion, sufficient to preclude us from saying that there was no "discovery" in fact. The second answer is this. I think that this Court could and should interfere to stop further proceedings if it were proved or admitted that the surveyor never had satisfied himself that a person was chargeable and had acted without any inquiry at all, and also if it were proved or admitted that his belief was founded on an obvious and manifest mistake in law. But if the ground is one which requires serious investigation and is not the result of an obvious mistake, I think that the matter must be left to the General Commissioners, who can state a case. Otherwise the same difficulty as to delay would arise which I have already pointed out. It is clear that the question as to the power of a person to carry on business through a company acting as his agent is one deserving of careful consideration and is not one which this Court could deal with in the summary manner suggested.

For these reasons I am of opinion that we ought to refuse the prohibition and discharge the rule with costs.

Rule discharged with costs: One set of costs only.

Solicitors for applicant: *Burn & Berridge.*

Solicitor for Commissioners of Inland Revenue: *Solicitor of Inland Revenue.*

Solicitor for Bloomsbury Income Tax Commissioners: *A. Donaldson.*

NOTE.—Income Tax Act, 1842 (5 & 6 Vict. c. 35), s. 100, Third Rule of "Rules applying to both the preceding Cases" (i.e., First and Second Cases under the heading "Schedule D"): "The computation of duty arising in respect of any trade, manufacture, adventure, or concern, or any profession, carried on by two or more persons jointly, shall be made and stated jointly and in one sum, and separately and distinctly from any other duty chargeable on the same persons, or either or any of them; and the return of the partner who shall be first named in the deed, instrument, or other agreement of copartnership . . . . and who shall be resident in Great Britain"—now by s. 5 of the Income Tax Act, 1853 (16 & 17 Vict. c. 34), the United

Kingdom—"(and who is hereby required, under the penalty herein contained for default in making any return required by the Act, to make such return on behalf of himself and the other partner or partners whose names and residences shall also be declared in such return,) shall be sufficient authority to charge such partners jointly . . . ."

Sect. 106: "Every person being a householder (except persons engaged in any trade, manufacture, adventure, or concern, or any profession, employment, or vocation) shall be charged to the said duties contained in Schedule D by Commissioners acting for the parish or place where his dwelling-house shall be situate; and every person engaged in any trade, manufacture, adventure, or concern, or any profession, employment, or vocation, shall be chargeable by the respective Commissioners acting for the parish or place where such trade, manufacture, adventure or concern shall be carried on, or where such profession, employment, or vocation shall be exercised, whether such trade, manufacture, adventure, or concern shall be carried on, or such profession, employment, or vocation shall be exercised, wholly or in part only in Great Britain, or whether such person shall be engaged in one only or more of such concerns, except where the same person shall be engaged in different concerns, and a loss from one concern shall be set off or deducted from the profits of another concern . . . ."

By s. 161, "The several inspectors and surveyors . . . . are hereby empowered respectively to inspect and examine all . . . . returns made by any person under the directions of this Act . . . . and if any such inspector or surveyor shall find or discover . . . . that any person, corporation, company, or society who ought to be charged with the said duties, or any of them, shall have been omitted to be charged therewith, or shall have been under-rated in the assessment, or that any person, or the officer of any corporation, company, or society, liable to the said duties or any of them, being required so to do, hath neglected or refused to make a return according to the directions of this Act . . . . so that such person, corporation, company, or society shall not have been fully charged to the said duties, then . . . . the said surveyor or inspector shall certify the same in writing under his hand, together with an account of every default, and the full amount of the duty which ought to be paid by way of surcharge to the said respective Commissioners for putting in execution this Act in relation to the duties on which such surcharge shall be made, in the manner and under and subject to the rules and regulations prescribed and contained in the said two several recited Acts of the forty-eighth and fiftieth years of the reign of King George the Third, hereinbefore recited or referred to."

Taxes Management Act, 1880 (43 & 44 Vict. c. 19), s. 52: "If the surveyor discovers that any properties or profits chargeable to the duties have been omitted from such first assessments, or that any person so chargeable has not made a full and proper or any return, or has not been charged to the said duties, or has been undercharged in the said first assessments, or has obtained and been allowed from and in such first assessments any allowance, deduction, abatement, or exemption not authorized by the Tax Acts, then . . . .

1915

REX v. BLOOMSBURY INCOME TAX COMMISSIONERS.

"(2.) As regards the duties chargeable under Schedule D of the Income Tax Acts, the additional Commissioners shall at any time after the said first assessments have been signed and allowed, but within four months after the expiration of the year to which such first assessments relate, make an assessment on any such person in an additional first assessment in such sum as according to their judgment ought to be charged on such person subject to objection by the surveyor and to appeal."

Sect. 57, sub-s. 3: "A person aggrieved by an assessment upon him included in any first or additional first assessment shall, on giving ten days' notice of objection in writing to the surveyor within the time limited for hearing appeals, be entitled to appeal to the General Commissioners against such assessment within twenty days after the date of the notice of such assessment to the party charged therewith."

By s. 59, sub-s. 1, the Special or General Commissioners may be required to state a case for the opinion of the High Court.

By s. 23, sub-s. 2, of the Finance Act, 1907 (7 Edw. 7, c. 13), "the time during which an assessment may be amended or an additional first assessment made under section 52 of the Taxes Management Act, 1880, ... shall be any time within the year of assessment or within three years after the expiration thereof."

J. E. A.

END OF VOL. III.

The Mode of Citation of the Volumes of the *Law Reports* commencing January 1, 1915, will be as follows:—

In the First Series,
[1915] 1 Ch. [1915] 2 Ch.

In the Second Series,
[1915] 1 K. B. [1915] 2 K. B. [1915] 3 K. B. [1915] P.

In the Third Series,
[1915] A. C.

INDEX.

ACCIDENT—Workmen's compensation.
See under EMPLOYER AND WORKMAN.

ADMIRALTY.
See under SHIPPING.

ADMISSIBILITY — Evidence — Contract — Writing — Rescission or variation — Subsequent parol agreement - **242**
See CONTRACT. 2.

ADULTERATION—*Sale to Prejudice of Purchaser— Quality of Article demanded—Mixed Butter and Margarine—Sale of Food and Drugs Act*, 1875 (38 & 39 *Vict. c.* 63), *s.* 6—*Sale of Food and Drugs Act Amendment Act*, 1879 (42 & 43 *Vict. c.* 30), *s.* 2—*Sale of Food and Drugs Act*, 1899 (62 & 63 *Vict. c.* 51), *s.* 8.

By s. 6 of the Sale of Food and Drugs Act, 1875, "No person shall sell to the prejudice of the purchaser any article of food . . . . which is not of the nature, substance, and quality of the article demanded by such purchaser," under a penalty.

By s. 2 of the Sale of Food and Drugs Act Amendment Act, 1879, it shall not be "a good defence to prove that the article of food . . . . in question, though defective in nature or in substance or in quality, was not defective in all three respects."

By s. 8 of the Sale of Food and Drugs Act, 1899, it "shall be unlawful to . . . . sell . . . . any margarine, the fat of which contains more than ten per cent. of butter fat . . . ."

An information was preferred by the respondent against the appellant and another for unlawfully selling to the prejudice of the purchaser mixed butter and margarine which was not of the nature, substance, and quality of the article demanded by the purchaser, there being a proportion of 80 per cent. of foreign fat, 15½ per cent. of water, curd, and salt, and 4½ per cent. of butter, contrary to the Sale of Food and Drugs Act, 1875. An agent of the respondent, acting upon his instructions, went to the appellant's shop and asked an assistant for two ounces of butter at 1*s.* 2*d.* per lb. The assistant informed the respondent's agent that the appellant did not

ADULTERATION—*continued.*

sell butter at the shop at the price of 1*s.* 2*d.* per lb., but that he did sell a mixture of butter and margarine at 1*s.* 2*d.* which was very good. The respondent's agent stated to the assistant that she would have two ounces of the mixture, and the same was put up in a wrapper and supplied to her accordingly by the assistant upon payment of 1¾d. At the date of the sale the retail price of margarine was 6*d.*, 8*d.*, and 10*d.* per lb., and the retail price of butter was 1*s.* 2*d.* to 1*s.* 6*d.* per lb.

The magistrate was of opinion that an offence had been committed on the ground that in view of the proportions of the several ingredients the mixture could be regarded only as a colourable one, and that in describing it as "very good" and selling it at the price named it was intended to deceive the purchaser by leading him to believe that it contained a substantial proportion of butter, whereas the analysis disclosing only a small percentage of butter fat showed that it contained no such substantial proportion. He accordingly convicted the appellant. On an appeal to the Divisional Court:—

Held, (1.) that the word "quality" in s. 6 of the Sale of Food and Drugs Act, 1875, means commercial quality of the article sold and not merely its description; (2.) that regard must be be had to s. 8 of the Sale of Food and Drugs Act, 1899, which the magistrate had not before him, and which makes it unlawful to sell any margarine "the fat of which contains more than ten per cent. of butter fat." Therefore, when considering the amount of butter the purchaser of a mixture of margarine and butter had a right to expect, the law which makes it an offence to sell margarine mixed with more than 10 per cent. of butter must be taken into account, and it was impossible to hold that there was evidence in the present case of a colourable sale. The conviction must therefore be quashed.
ANNESS *v.* GRIVELL - - - **Div. Ct. 685**

—— Justices—Jurisdiction—Right to act in any petty sessional division of county—Sale of milk—Offence—Place of delivery
See JUSTICES. **388**

AGREEMENT—Contract.
See under CONTRACT.

AGRICULTURAL LAND—Duty of tenant to cultivate—Breach—Measure of damage *See* LANDLORD AND TENANT. 1. 493

AIR SHAFT—Houses deemed to be unfit for human habitation—Back-to-back houses—Two-thirds of space at back of houses contiguous — Remaining one-third of space occupied by air shaft — Closing order - - - - - - 249
See LOCAL GOVERNMENT. 2.

ALIEN—*Alien Enemy—Bank with Office in London—Licence to carry on Business—Licence subject to Conditions—Judgment Creditor issuing Execution—Staying Execution—Aliens Restriction (Consolidation) Order*, 1914, *clause* 24 (1.)—*Aliens Restriction Act*, 1914 (4 *&* 5 *Geo.* 5, *c.* 12), *s.* 1, *sub-s.* 1.

The plaintiffs were a firm of English solicitors carrying on business in London with a branch office in Berlin. The defendants were a banking corporation, incorporated under German law, having their head office in Berlin with an office in London. The plaintiffs before the outbreak of war between Great Britain and Germany on August 4, 1914, had a current account at the defendants' office in Berlin.

After the outbreak of war the Secretary of State, acting under the Aliens Restriction Act, 1914, and an Order in Council, granted a licence to the defendants to carry on business in the United Kingdom subject to certain limitations and conditions the effect of which was that the permission was to extend only to the completion of transactions of a banking character entered into before the war so far as those transactions would in ordinary course have been carried out through or with the London establishment, but not to any operations for the purpose of making available assets which would ordinarily be collected by, or of discharging liabilities which would ordinarily be discharged by, establishments of the bank other than the London establishment; that all transactions carried out under the licence were to be subject to the supervision and control of a person to be appointed by the Treasury; and that any assets of the bank which might remain undistributed after the liabilities had been discharged should be deposited with the Bank of England to the order of the Treasury.

While the defendants were carrying on business under the licence the plaintiffs brought an action in England against the defendants to recover the amount due on their current account at the Berlin office and obtained judgment. The plaintiffs issued a writ of fi. fa. in execution of the judgment and the sheriff seized certain goods and chattels belonging to the defendants at the London office. The defendants applied for an order to stay proceedings under the writ of fi. fa. :—

Held, that it was inconsistent with the conditions of the licence, which were within the powers conferred upon the Secretary of State by the Aliens Restriction Act, 1914, and the Order in Council, that the plaintiffs should be allowed

ALIEN—*continued.*

to take in execution of their judgment the assets of the bank which were subject to the supervision and control of the person appointed for that purpose by the Treasury, and that therefore all proceedings under the writ of fi. fa., so far as regards those assets, should be stayed. LEADER *v.* DIRECTION DER DISCONTO GESELLSCHAFT **C. A. 154**

2. —— *Nationality—Son born Abroad of Naturalized British Subject—Status of Son—Aliens Act*, 1844 (7 *&* 8 *Vict. c.* 66), *s.* 6—*Naturalization Act*, 1870 (33 *Vict. c.* 14), *ss.* 4, 10—*British Nationality and Status of Aliens Act*, 1914 (4 *&* 5 *Geo.* 5, *c.* 17), *s.* 1.

A child born in a foreign State prior to the commencement of the British Nationality and Status of Aliens Act, 1914, did not obtain the status of British nationality by the mere fact that his father was a naturalized British subject. REX *v.* ALBANY STREET POLICE STATION SUPERINTENDENT - - - **Div. Ct. 716**

ALIENS RESTRICTION (CONSOLIDATION) ORDER, 1914, clause 24 (1.) - **154**
See ALIEN. 1.

APPEAL—Bastardy—Jurisdiction of justices—Previous dismissal of application—Effect of new right of appeal to quarter sessions—Res judicata - - - **237**
See BASTARDY.

—— Income tax — Jurisdiction of additional Commissioners — Appeal to General Commissioners — Prohibition to Commissioners - - - - - **768**
See REVENUE. 3.

—— Insurance (National) — Issue as to debt owing or accruing — Reference to Master to ascertain amount — Appeal from finding of Master - - **499**
See INSURANCE (NATIONAL). 1.

—— Midwife — "Misconduct" — Rules of procedure on removal of name from roll
See MIDWIVES. **756**

—— Railway — Light Railways Act, 1896 — Right of appeal to Board of Trade—"Application refused" - - **536**
See RAILWAY. 1.

APPORTIONMENT — Street — Private street works — Provisional apportionment — Premises not abutting on street — "Access through court, passage, or otherwise" - - - - - **707**
See STREETS. 1.

ARBITRATION—*Staying Proceedings—Arbitration Clause in Contract—Action for fraudulently inducing Plaintiff to enter into Contract—Arbitration Act*, 1889 (52 *&* 53 *Vict. c.* 49), *s.* 4.

The plaintiff, a contractor, entered into a written contract with the defendants for the construction of certain sewerage works; the contract contained a clause that "if at any time any question, dispute or difference shall arise between the council or their engineer and the

ARBITRATION—*continued.*

contractor upon or in relation to or in connection with the contract the matter shall be referred to and determined by the engineer . . . ." After he had done certain work under the contract the plaintiff refused to complete the work, alleging that he had been induced to enter into the contract by fraudulent misrepresentations made in the specification as to the nature of the subsoil of the ground where the work was to be done, and he brought an action to recover damages for the alleged misrepresentations and to have the contract declared void. The defendants having taken out a summons under s. 4 of the Arbitration Act, 1889, to stay the proceedings and refer the dispute to arbitration under the arbitration clause in the contract :—

Held, that the dispute was not a dispute "upon or in relation to or in connection with the contract" within the meaning of the arbitration clause, and that the defendants were not entitled to have the proceedings stayed. MONRO *v.* BOGNOR URBAN DISTRICT COUNCIL - **C. A. 167**

—— Insurance (Fire) — Consequential loss — Assessment of loss by insured's auditor — Evidence — Auditor as witness — Cross-examination — Conclusiveness of assessment - - - - - **277**
See INSURANCE (FIRE).

—— Workmen's compensation — Jurisdiction—Question arising — Liability to pay compensation—Duration of compensation - - - - - - **210**
See EMPLOYER AND WORKMAN. 3.

ARBITRATOR — Local government — County boroughs — Adjustment of financial relations to county—Appointment of arbitrator to make equitable adjustment—Power of arbitrator - - **438**
See LOCAL GOVERNMENT. 1.

ARMY—Workmen's compensation — Workman in receipt of compensation—Enlisting in Army—Serving abroad—Suspension of compensation - - - - **218**
See EMPLOYER AND WORKMAN. 8.

ARRANGEMENT—Deed of.
See under DEED OF ARRANGEMENT.

ASSESSMENT—Insurance (Fire) - - **277**
See INSURANCE (FIRE).

ATTACHMENT — Debts—Insurance (National) —"Debt"—Fees payable by National Insurance Committee to panel doctor
See INSURANCE (NATIONAL). 1. **499**

ATTORNEY-GENERAL — Fiat of — Malicious prosecution—Reasonable and probable cause — Corroboration — Question for jury - - - - - - **527**
See MALICIOUS PROSECUTION.

AUDITOR — Insurance (Fire) — Consequential loss—Assessment of loss by insured's auditor — Arbitration — Evidence—Auditor as witness—Cross-examination —Conclusiveness of assessment - **277**
See INSURANCE (FIRE).

AVERAGE—General average - - - **586**
See SHIPPING. 4.

AVERAGE WEEKLY EARNINGS—Workmen's compensation—Basis of calculation—Death—Employment by same employer for three years—Interruptions - **97**
See EMPLOYER AND WORKMAN. 4.

BACK-TO-BACK HOUSES—Houses deemed to be unfit for human habitation - - **249**
See LOCAL GOVERNMENT. 2.

BANK — Alien enemy — Bank with office in London—Licence to carry on business — Licence subject to conditions — Judgment creditor issuing execution—Staying execution - - - **154**
See ALIEN. 1.

BANKING ACCOUNT—Income tax—Interest on credit balance of current account—"Yearly interest" - - - **381**
See REVENUE. 1.

BANKRUPTCY—County court—Order for payment of money—Whether action maintainable upon order - - - **174**
See COUNTY COURT.

BANKRUPTCY RULES, 1886, r. 93 - - **174**
See COUNTY COURT.

BASTARDY—*Jurisdiction of Justices—Previous Dismissal of Application—Effect of New Right of Appeal to Quarter Sessions—Res Judicata—Criminal Justice Administration Act*, 1914 (4 & 5 *Geo.* 5, *c.* 58), *s.* 37, *sub-s.* 2.

Sect. 37, sub-s. 2, of the Criminal Justice Administration Act, 1914, which enables a woman to appeal to quarter sessions from a refusal by a Court of summary jurisdiction to make an order for the maintenance of her bastard child, confers an additional remedy upon her, and does not impliedly take away her previously existing right to renew her application to the Court of summary jurisdiction.

The decision in *Reg.* v. *Machen* (1849) 14 Q. B. 74, where it was held that a refusal by justices to make an order for the maintenance of a bastard, though on the merits, is no bar to a second application, was founded, not on the ground that no appeal by the woman lay to quarter sessions, but on the ground that the dismissal of her previous application was in the nature of a nonsuit in an action.

Reg. v. *Gaunt* (1867) L. R. 2 Q. B. 466 ; *Reg.* v. *Glynne* (1871) L. R. 7 Q. B. 16 ; and *Stokes* v. *Stokes* [1911] P. 195 considered. MCGREGOR *v.* TELFORD - - - - - **Div. Ct. 237**

BILL OF SALE—*Registration—Occupation of Grantor—Description—Bills of Sale Act*, 1878 (41 & 42 *Vict. c.* 31), *ss.* 8, 10.

By s. 8 of the Bills of Sale Act, 1878, a bill of sale must be registered under the Act, otherwise as against a class of persons including execution creditors it is to be deemed fraudulent and void so far as regards the property in any chattels comprised therein and remaining after a certain time in the possession of the grantor.

BILL OF SALE—*continued.*

By s. 10, sub-s. 2, a bill of sale must be registered as therein provided. Among other requisites the bill of sale, and a copy of the bill of sale, together with an affidavit of the time of such bill of sale being made or given, and of its due execution and attestation, and a description of the residence and occupation of the person making or giving the same, must be presented to and the copy and affidavit must be filed with the registrar within the time and in the manner therein prescribed.

In the affidavit filed with a bill of sale the grantor was described as a Baptist minister. He lived in Essex and was a qualified Baptist minister. Until four or five years before the making of the bill of sale he had been in regular occupation as a pastor, but had held no pastorate since. In the interval he had preached, lectured, and visited the poor, but not in connection with any particular church. Since making the bill of sale he had preached on several occasions in Chelmsford. He was a director of three or four companies and, with the assistance of a secretary, conducted his business in connection with them from an address in London:—

Held, that he was not properly described as a Baptist minister, and that the bill of sale was void as against execution creditors.

Luckin v. *Hamlyn* (1869) 21 L. T. 366 discussed. BARRON *v.* POTTER. POTTER, CLAIMANT **C. A. 593**

BOARD OF TRADE—Railway—Light railway—Application to Commissioners—Right of appeal to Board of Trade - **536**
See RAILWAY. 1.

BRADFORD CORPORATION ACT, 1910, s. 25
See STREETS. 2. **13**

BRAKES—Motor car propelled by steam exceeding two tons in weight unladen—"Two independent brakes" - **477**
See MOTOR CAR.

BREACH—Landlord and tenant—Agricultural land—Duty of tenant to cultivate—Breach—Measure of damage - **493**
See LANDLORD AND TENANT. 1.

BRITISH NATIONALITY AND STATUS OF ALIENS ACT, 1914, s. 1 - - 716
See ALIEN. 2.

BUTTER—Adulteration—Sale to prejudice of purchaser—Quality of article demanded—Mixed butter and margarine - **685**
See ADULTERATION.

CANAL—Railway and canal traffic.
See under RAILWAY.

CAPITAL—Income tax—Deductions—Capital or income expenditure—Expenses of dredging and constructing deep water berth - - - - - - - **267**
See REVENUE. 2.

CAPTURE—Insurance (Marine)—Peril of capture—Ship putting into neutral port to avoid capture—Loss of venture—Whether loss proximately caused by peril insured against - - - **410**
See INSURANCE (MARINE). 1.

CAR—Motor car.
See under MOTOR CAR.

CASES:—

—— *Associated Newspapers Limited* v. *City of London Corporation* [1914] 2 K. B. 822.
Affirmed in part and reversed in part **[1915] 3 K. B. 128**

—— *Attorney-General* v. *Horner* (No. 2) [1913] 2 Ch. 140.
Referred to. MASKELL *v.* HORNER **[1915] 3 K. B. 106**

—— *Austin Friar Steamship Co., Ld.* v. *Spillers & Bakers, Ld.* [1915] 1 K. B. 833.
Affirmed - - **[1915] 3 K. B. 586**

—— *Beal* v. *Horlock* - [1915] 3 K. B. 203
Affirmed - - **[1915] 3 K. B. 627**

—— *Caistor Rural District Council* v. *Taylor* (1907) 71 J. P. 310.
Approved and followed. REX *v.* BEACONTREE JUSTICES. REX *v.* WRIGHT - - **[1915] 3 K. B. 388**

—— *Duncan, Fox & Co.* v. *Schrempft & Bonke* [1915] 1 K. B. 365.
Affirmed - - **[1915] 3 K. B. 355**

—— *Firth* v. *McPhail* - [1905] 2 K. B. 300
Considered. BOTHAMLEY *v.* JOLLY **[1915] 3 K. B. 425**

—— *Fratelli Sorrentino* v. *Buerger* [1915] 1 K. B. 307.
Affirmed - - **[1915] 3 K. B. 367**

—— *Hayward* v. *Westleigh Colliery Co.* [1915] A. C. 540.
Explained and distinguished. MILLER *v.* RICHARDSON - **[1915] 3 K. B. 76**

—— *Healey* v. *Galloway* (1907) 41 Ir. L. T. R. 5
Discussed and distinguished. LUCKIE *v.* MERRY - - **[1915] 3 K. B. 83**

—— *Hebert* v. *Royal Society of Medicine* (1911) 56 Sol. J. 107.
Referred to. SEAL *v.* TURNER **[1915] 3 K. B. 194**

—— *Hill* v. *Tottenham Urban Council* (1898) 15 Times L. R. 53.
Followed. THOMPSON *v.* BRADFORD CORPORATION AND TINSLEY **[1915] 3 K. B. 13**

—— *King* v. *Cadogan* (*Earl*) [1915] 1 K. B. 821.
Affirmed - - **[1915] 3 K. B. 485**

—— *Luckin* v. *Hamlyn* - (1869) 21 L. T. 366
Discussed. BARRON *v.* POTTER. POTTER, CLAIMANT **[1915] 3 K. B. 593**

—— *Lynch* v. *Lansdowne* (*Marquis of*) (1913) 48 Ir. L. T. R. 89.
Discussed and distinguished. LUCKIE *v.* MERRY - - **[1915] 3 K. B. 83**

CASES—*continued.*

—— *McClelland* v. *Manchester Corporation* [1912] 1 K. B. 118.
Followed. THOMPSON *v.* BRADFORD CORPORATION AND TINSLEY [1915] 3 K. B. 13

—— *Merryweather* v. *Nixan* (1799) 8 T. R. 186; 1 Sm. L. C., 12th ed., p. 443.
Discussed. AUSTIN FRIARS STEAMSHIP COMPANY *v.* SPILLERS & BAKERS [1915] 3 K. B. 586

—— *Newquay Urban Council* v. *Rickeard* [1911] 2 K. B. 846.
Dictum of Lord Alverstone C.J. in, explained. CHATTERTON *v.* GLANFORD RURAL DISTRICT COUNCIL [1915] 3 K. B. 707

—— *O'Driscoll* v. *Manchester Insurance Committee* [1915] 1 K. B. 811.
Affirmed - - [1915] 3 K. B. 499

—— *Osmond* v. *Mutual Cycle and Manufacturing Supply Co.* [1899] 2 Q. B. 488, 494.
Dictum of A. L. Smith L.J. in, dissented from. SEAL *v.* TURNER [1915] 3 K. B. 194

—— *Payne* v. *Fortescue & Sons* [1912] 3 K. B. 346.
Distinguished. COOPER *v.* WALES, LIMITED - - [1915] 3 K. B. 210

—— *Perry* v. *Wright* - [1908] 1 K. B. 441
Followed. GREENWOOD *v.* NALL & CO. LIMITED - - [1915] 3 K. B. 97

—— *Reg.* v. *Beckley* - (1887) 20 Q. B. D. 187
Approved and followed. REX *v.* BEACONTREE JUSTICES. REX *v.* WRIGHT - - [1915] 3 K. B. 388

—— *Reg.* v. *Gaunt* - (1867) L. R. 2 Q. B. 466
Considered. MCGREGOR *v.* TELFORD [1915] 3 K. B. 237

—— *Reg.* v. *Glynne* - (1871) L. R. 7 Q. B. 16
Considered. MCGREGOR *v.* TELFORD [1915] 3 K. B. 237

—— *Reg.* v. *Machen* - (1849) 14 Q. B. 74
Discussed. MCGREGOR *v.* TELFORD [1915] 3 K. B. 237

—— *Rex* v. *Board of Trade*, *Rex* v. *Light Railway Commissioners* [1915] 1 K. B. 162.
Reversed - - [1915] 3 K. B. 536

—— *Rex* v. *Carson Roberts*, *Ex parte Stepney Corporation* [1915] 1 K. B. 110.
Affirmed - - [1915] 3 K. B. 313

—— *Rex* v. *Richards*, *Rex* v. *Williams* [1915] 1 K. B. 299.
Affirmed - - [1915] 3 K. B. 402

—— *Salt* v. *Tomlinson* - [1911] 2 K. B. 391
Considered. BOTHAMLEY *v.* JOLLY [1915] 3 K. B. 425

—— *Sion College* v. *London Corporation* [1901] 1 K. B. 617.
Followed. ASSOCIATED NEWSPAPERS LIMITED *v.* CITY OF LONDON CORPORATION (No. 2) - [1915] 3 K. B. 128

CASES—*continued.*

—— *Steel* v. *Dartford Local Board* (1891) 60 L. J. (Q.B.) 256.
Distinguished. THOMPSON *v.* BRADFORD CORPORATION AND TINSLEY [1915] 3 K. B. 13

—— *Stokes* v. *Stokes* - - [1911] P. 195
Considered. MCGREGOR *v.* TELFORD [1915] 3 K. B. 237

—— *Vezey* v. *Rashleigh* - [1904] 1 Ch. 634
Considered. WILLIAMS *v.* MOSS' EMPIRES, LIMITED - [1915] 3 K. B. 242

—— *William France Fenwick & Co., Ld.* v. *Merchants' Marine Insurance Co., Ld.* [1914] 3 K. B. 827.
Affirmed on other grounds [1915] 3 K. B. 29

CHARTERPARTY—Shipping.
See under SHIPPING.

CHILDREN — *Local Government — Youthful Offender—Place of Residence—Maintenance by Local Authority—Constructive or Actual Residence—Children Act*, 1908 (8 *Edw.* 7, *c.* 67), *s.* 74, *sub-s.* 7.

The words "place of residence of a youthful offender" in s. 74, sub-s. 7, of the Children Act, 1908, mean the place where the youthful offender is actually living. Therefore if he is not in fact living with his parents he cannot, within the meaning of the sub-section, be considered as constructively residing with them. STOKE-ON-TRENT BOROUGH COUNCIL *v.* CHESHIRE COUNTY COUNCIL - **Div. Ct. 699**

CINEMATOGRAPH — *Cinematograph Exhibitions—Premises used for—Use in Contravention of Act—Liability of Occupier—Incorporated Company — Manager of Premises — Cinematograph Act*, 1909 (9 *Edw.* 7, *c.* 30), *s.* 3.

By s. 3 of the Cinematograph Act, 1909, "If the occupier of any premises" used for cinematograph exhibitions "allows those premises to be used in contravention of the provisions of this Act" he is liable to a penalty :—

Held, that where the owner of such premises employs a servant to manage them on his behalf and subject to his control the owner and not the manager is the occupier for the purposes of that section. BRUCE *v.* MCMANUS - **Div. Ct. 1**

CLAIM—Workmen's compensation—Reasonable cause for not making claim within six months—Payment by employer of full wages - - - - - - - **83**
See EMPLOYER AND WORKMAN. 6.

COAL MINE.
See under MINES.

COLLISION — Insurance (Marine) — Running-down clause—Damage in consequence of collision—Construction of clause **290**
See INSURANCE (MARINE). 2.

COMMISSION—Rating of owners—Commission allowed to owner—"Dwelling-house or tenement"—Part of house let as office and workshop - - - - - **313**
See RATES. 2.

COMPANY—Incorporated company—Cinematograph — Cinematograph exhibitions — Premises used for—Use in contravention of Act—Liability of occupier—Manager of premises 1
See CINEMATOGRAPH.

COMPENSATION—Licensing Acts.
See under LICENSING ACTS.

—— Workmen's compensation.
See under EMPLOYER AND WORKMAN.

COMPENSATION AUTHORITY—Licensing Acts—Licence — Renewal — Reference to compensation authority — Evidence—Differentiation - - - - - 48
See LICENSING ACTS.

CONDITION — Implied condition — Contract—Impossibility of performance—Sale of specific goods—Goods requisitioned by the Crown before delivery and before property passed to purchaser—Seller excused from performance of the contract - - - - - - 676
See CONTRACT. 1.

—— Implied condition — Shipping — Charterparty—Tank steamship—Time charterparty—Employment for carriage of oil—Liberty to sub-let on Admiralty or other service—Requisition of steamship by Admiralty—Effect of requisition—Whether charterparty put an end to or suspended - - - - - - 668
See SHIPPING. 3.

CONSEQUENTIAL LOSS — Insurance (Fire)—Assessment of loss by insured's auditor—Arbitration — Evidence—Auditor as witness — Cross-examination — Conclusiveness of assessment - - 277
See INSURANCE (FIRE).

CONSTRUCTIVE OR ACTUAL RESIDENCE — Local government—Youthful offender—Place of residence—Maintenance by local authority - - - - 699
See CHILDREN.

CONTRACT — *Impossibility of Performance — Implied Condition—Sale of Specific Goods—Goods requisitioned by the Crown before Delivery and before Property passed to Purchaser — Seller excused from Performance of the Contract.*

By a contract in writing, made in September, 1914, the owner of a specific parcel of wheat in a warehouse in Liverpool sold it upon the terms "payment cash within seven days against transfer order." Before delivery and before the property passed to the buyer the wheat was requisitioned by and delivered to His Majesty's Government under the powers of an Act passed before the date of the contract:—

Held, that, delivery of the wheat by the seller to the buyer having been rendered impossible by the lawful requisition of the Government, the seller was excused from performance of the contract. *In re* SHIPTON, ANDERSON & CO. AND HARRISON BROTHERS & CO.'S ARBITRATION - - - - Div. Ct. 676

CONTRACT—*continued.*

2. —— *Writing — Rescission or Variation — Subsequent Parol Agreement — Evidence — Admissibility.*

By a contract in writing which was not to be performed within a year from the making thereof the plaintiff was engaged by the defendants to perform at their theatres on certain terms including the payment of salary at a specified rate. During the currency of the contract and within less than a year of its termination the parties verbally agreed to a variation of the plaintiff's salary for a part of the remainder of the engagement. Subsequently the plaintiff sued the defendants to recover salary earned since the verbal agreement, at the rate specified in the original contract:—

Held, that the verbal agreement, being one which was to be performed within a year, and, therefore, not within the Statute of Frauds, was admissible in evidence to prove that the parties had substituted for the original contract a new contract embodying the variation as to salary and the unaltered terms of the original contract.

Vezey v. *Rashleigh* [1904] 1 Ch. 634 considered. WILLIAMS *v.* MOSS' EMPIRES, LIMITED - - - - - - Div. Ct. 242

—— Arbitration — Staying proceedings — Arbitration clause in contract—Action for fraudulently inducing plaintiff to enter into contract - - - - - 167
See ARBITRATION.

—— Illegality — Contract — Land company — Newspaper professing to give the public honest advice upon dealings in land—Bribe to newspaper to suppress comment — Restraint of trade — Public policy - - - - - - - 556
See ILLEGALITY.

—— Sale of goods—C.i.f. contract — Payment against shipping documents—Outbreak of war before tender of documents—Trading with the enemy — Whether buyers bound to accept documents 355
See SALE OF GOODS.

CONTRACT OF SERVICE — Workmen's compensation — "Workman" — Independent contractor — Average weekly earnings — Deductions from wages — Necessary assistance - - - 222
See EMPLOYER AND WORKMAN. 7.

CONTRACTOR — Workmen's compensation — "Workman" — Contract of service — Independent contractor — Deductions from wages—Necessary assistance 222
See EMPLOYER AND WORKMAN. 7.

CONTRIBUTION — Shipping — General average act — Ship and cargo in danger — Damage to dock—Tortfeasors - 586
See SHIPPING. 4.

CORROBORATION — Malicious prosecution — Reasonable and probable cause — Question for jury—Fiat of Attorney-General - - - - - - 527
See MALICIOUS PROSECUTION.

COSTS—*Shorthand Notes—Joint Note—Agreement—Costs in the Cause—Practice—Rules of the Supreme Court, Order LXV., r.* 27.

In an action to recover money subscribed for preference shares and which the plaintiff alleged had been obtained from him by fraudulent misrepresentation, the trial lasted eight days and resulted in judgment for the defendant with costs.

On taxation the Master allowed the costs of taking and transcribing a shorthand note of the proceedings and of transcripts for the judge and counsel for the defendant. The plaintiff objected to this item and insisted that there was nothing to make these costs costs in the cause. It appeared that at the commencement of the trial both parties came to an agreement that a note should be taken and a transcript provided for the judge:—

Held, that there was an implied agreement that the costs of taking the note, transcribing it, and making a copy for the judge should be borne equally by the parties (nothing having been said about making these costs costs in the cause), and that the plaintiff was liable to pay half of these costs, but

Held, also, reversing the decision of Bailhache J., that in the absence of a direction by the judge at the trial or an agreement by the parties that the costs of the shorthand notes should be costs in the cause, such costs ought not to be allowed on taxation as part of the costs of the cause; and that except to the extent above stated no such agreement could be implied in the present case. The decision in *Hebert* v. *Royal Society of Medicine* (1911) 56 Sol. Jo. 107 dealt only with costs in the Court of Appeal and did not affect this question.

Dictum of A. L. Smith L.J. in *Osmond* v. *Mutual Cycle and Manufacturing Supply Co.* [1899] 2 Q. B. 488, 494, dissented from. SEAL *v.* TURNER - - - - - - C. A. 194

—— "Feeble-minded person" — Petition for order sending to institution—Petition by "the parent"—"Without visible means of support"—Jurisdiction as to costs of petition—Mental deficiency
See MENTAL DEFICIENCY. 418

COUNTY COUNCIL—Public health—Offensive businesses—Duty to take proceedings for offences—Sanitary authority—Proceedings by county council - - 305
See LONDON. 2.

COUNTY COURT — *Bankruptcy — Order for Payment of Money—Whether Action maintainable upon Order—County Court Rules*, 1903, *Order XXV., r.* 2—*Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *ss.* 100, 168—*Bankruptcy Rules*, 1886, *r.* 93.

An action is maintainable upon an order for the payment of money made by a county court in the exercise of its bankruptcy jurisdiction.

So *held* by Lord Reading C.J. and Swinfen Eady L.J., Bray J. dissenting. SAVILL *v.* DALTON - - - - - - - C. A. 174

—— Jurisdiction of county court—Licensing—Licence duty — Right of lessee to recover increase of duty from lessor - 59
See LICENSING.

COUNTY COURT RULES, 1903, Order XXV., r. 2 - - - - - - - 174
See COUNTY COURT.

CREDITOR—Deed of arrangement—Recital of debt — Trustee — Right of trustee to deny existence of debt - - 519
See DEED OF ARRANGEMENT.

CRIMINAL JUSTICE ADMINISTRATION ACT, 1914, s. 37, sub-s. 2 - - 237
See BASTARDY.

CRIMINAL LAW—*Housebreaking Implements—Workman's Tools—Possession by Night—Lawful Excuse—Onus of Proof—Larceny Act*, 1861 (24 & 25 *Vict. c.* 96), *s.* 58.

By s. 58 of the Larceny Act, 1861, it is an offence for a person to be found by night in possession of an implement of housebreaking "without lawful excuse (the proof of which shall lie on such person)":—

Held, that the onus of proof as to lawful excuse is discharged by an accused person if he proves that the alleged implement of housebreaking, though capable of being used for that purpose, is a tool used by him in his trade or calling. REX *v.* WARD - - C. C. A. 696

—— Bastardy.
See under BASTARDY.

—— Fishery — Stealing fish from — Whether winkles are fish - - - - - 9
See FISHERY.

CROSS-EXAMINATION — Insurance (Fire) — Consequential loss—Assessment of loss by insured's auditor — Arbitration — Evidence—Auditor as witness—Cross-examination—Conclusiveness of assessment - - - - - - 277
See INSURANCE (FIRE).

CROWN—Contract—Impossibility of performance — Implied condition — Sale of specific goods—Goods requisitioned by the Crown before delivery and before property passed to purchaser — Seller excused from performance of contract
See CONTRACT. 1. 676

—— Prerogative—War—Defence of the realm—Naval and military authorities—Right to take possession of land and buildings without compensation - - 649
See WAR.

CULTIVATION — Agricultural land — Duty of tenant to cultivate—Breach—Measure of damage - - - - - 493
See LANDLORD AND TENANT. 1.

DAMAGE—Agricultural land—Duty of tenant to cultivate — Breach — Measure of damage - - - - - - 493
See LANDLORD AND TENANT. 1.

—— Insurance (Marine)—Running-down clause—Damage in consequence of collision—Construction of clause - - 290
See INSURANCE (MARINE). 2.

DAMAGE—*continued.*

—— Shipping—General average act—Ship and cargo in danger—Damage to dock—Tortfeasors—Contribution - 586
See SHIPPING. 4.

DEATH — Workmen's compensation — Basis of calculation—Employment by same employer for three years—Interruptions—Average weekly earnings - - 97
See EMPLOYER AND WORKMAN. 4.

DEBT—Deed of arrangement—Creditor—Recital of debt—Trustee—Right of trustee to deny existence of debt - - 519
See DEED OF ARRANGEMENT.

—— Insurance (National)—Attachment of debts—"Debt"—Fees payable by National Insurance Committee to panel doctor
See INSURANCE (NATIONAL). 1. 499

DEED OF ARRANGEMENT—*Creditor—Recital of Debt — Trustee — Right of Trustee to deny Existence of Debt—Deeds of Arrangement Act*, 1914 (4 & 5 *Geo.* 5, *c.* 47), *s.* 23.

By a deed of arrangement for the benefit of creditors, which recited that certain persons were creditors of the assignor for the sums set opposite to their names in a schedule to the deed, the assignor conveyed to a trustee, who was a party to the deed, certain properties upon trust to pay thereout to the creditors named the sums specified in the schedule. Two of the persons named in the schedule as creditors, one of whom had executed, and the other of whom had assented to, the deed, had been creditors of the assignor for the sums specified, but their debts had previously to the execution of the deed been discharged by the bankruptcy of the assignor, in which they had refrained from proving, and no fresh consideration had subsequently been given for the sums stated in the deed to be owing to them:—

Held, that, the deed being admitted to be one for the benefit of creditors generally, the trustee was entitled to obtain a declaration under s. 23 of the Deeds of Arrangement Act, 1914, that the persons in question were not in fact creditors of the assignor, notwithstanding that the trustee was himself a party to the deed in which they were stated to be creditors. *In re* PILET. *Ex parte* A. TOURSIER & CO. AND BERKELEY
Div. Ct. 519

DEFAMATION —*Libel—Publication—Communication posted in Unclosed Envelope.*

The defendant sent through the post in an unclosed envelope a written communication which the plaintiffs alleged was defamatory of them. The communication was taken out of the envelope and read by a butler who was a servant at the house to which the envelope was addressed in breach of his duty and out of curiosity. In an action for libel brought by the plaintiffs against the defendant:—

Held, that there was no evidence of publication by the defendant of the communication, and that therefore the action would not lie. HUTH *v.* HUTH - - - - C. A. 32

DEFAMATION—*continued.*

—— Libel—Justification—Discovery—Character and reputation—Particulars of justification—Acts occurring after date of libel
See DISCOVERY. 336

DEFENCE OF THE REALM—War—Crown—Prerogative — Naval and military authorities—Right to take possession of land and buildings without compensation - - - - - 649
See WAR.

DESCRIPTION — Bill of sale — Registration — Occupation of grantor - - 593
See BILL OF SALE.

DISCOVERY—*Libel — Justification — Character and Reputation — Particulars of Justification — Acts occurring after Date of Libel—Practice.*

The plaintiff brought an action against the defendants for libel which he alleged meant that he had absconded with the property of a company, that his solvency was doubtful, and that his character and reputation were such that he was likely to misappropriate funds of companies with which he was connected. The defendants pleaded that the words taken in that sense were true in substance and in fact, and in their particulars of defence they stated various acts by the plaintiff to show that he had a tendency to be dishonest. Several of these acts had occurred after the date of the publication of the libel, and the plaintiff applied for an order to strike these out as inadmissible:—

Held, affirming the decision of Ridley J., that in a case of libel on character and reputation, where justification was pleaded, evidence of facts which occurred within a reasonable time after the publication of the libel and went to show the existence of an alleged tendency was admissible. MAISEL *v.* FINANCIAL TIMES, LIMITED - - - - - - C. A. 336

DISTRICT SURVEYOR — London — Power of London County Council to dismiss 580
See LONDON. 1.

DOCK—General average act—Ship and cargo in danger—Damage to dock—Tortfeasors—Contribution - - - - 586
See SHIPPING. 4.

DOCTOR—Insurance (National) — Attachment of debts—"Debt"—Fees payable by National Insurance Committee to panel doctor - - - - - - 499
See INSURANCE (NATIONAL). 1.

DREDGING—Income tax—Deductions—Capital or income expenditure — Expenses of dredging and constructing deep water berth - - - - - - 267
See REVENUE. 2.

DROWNING — Workmen's compensation — Seaman — Unexplained drowning — Evidence—Inference—Conjecture 344
See EMPLOYER AND WORKMAN. 2.

DUTY — Licensing — Licence duty — Right of lessee to recover increase of duty from lessor—Jurisdiction of county court 59
See LICENSING.

ELECTION — Parliament — Returning officer — Municipal borough a county of itself — Parliamentary borough with two mayors - - - - - - **402**
See PARLIAMENT.

EMPLOYER AND WORKMAN—*Compensation—Accident arising out of and in the Course of the Employment—Direction by Employer to "go and find a job"—Extending Scope of Employment — Workmen's Compensation Act*, 1906 (6 *Edw.* 7, *c.* 58), *s.* 1, *sub-s.* 1.

The workman, a boy of fourteen, was employed as a truck boy on a machine for cutting and making tops of packing cases, his duty being to push trucks of wood from the machine to the stack yard. He had nothing to do with the machine itself. Whilst waiting for a truck to be filled for him to move, one of his employers, seeing him apparently idle, told him to "go and find a job." He accordingly got a short stick and endeavoured to clear out the blower of the machine, which had become choked with chips, and in so doing slipped, and putting out his hand to save himself brought it in contact with the rotary saw of the machine and was seriously injured. On an application by him for compensation the county court judge held that the accident did not arise out of and in the course of the employment :—

Held, that the direction by the employer to "go and find a job" must be taken to have meant that the applicant was to do something which, although it was not within the scope of the employment, was boys' work and was not improper for him to do ; that what the applicant did was within that direction ; and accordingly that the accident arose out of and in the course of the employment. LANE *v.* W. LUSTY & SON **C. A. 230**

2. —— *Compensation—Accident arising out of Employment—Seaman—Unexplained Drowning—Evidence—Inference—Conjecture—Workmen's Compensation Act*, 1906 (6 *Edw.* 7, *c.* 58), *s.* 1.

A seaman was chief engineer on a steam vessel and was responsible for the working of all the machinery in the ship. He was troubled because there was something wrong with the propeller. On the evening before the ship arrived in port he told the steward to call him before his usual hour and let him have some tea. This was done ; he got up about 5.30 A.M., dressed in his working clothes, and was last seen going to the stern of the ship. His watch would not have begun till 8 o'clock :—

Held, that there was evidence to support the finding of the learned county court judge that his death was caused by an accident arising out of and in the course of his employment within the meaning of the Workmen's Compensation Act, 1906. PROCTOR *v.* OWNERS OF S.S. "SERBINO" - - - - - - **C. A. 344**

3. —— *Compensation — Arbitration — Jurisdiction — Question arising — Liability to pay Compensation — Duration of Compensation — Workmen's Compensation Act*, 1906 (6 *Edw.* 7, *c.* 58), *s.* 1, *sub-s.* 3.

A workman, whilst employed by the respondents, met with a severe accident to his left hand, which caused for the time total incapacity The respondents offered to pay full compensation during total incapacity. This was declined on the ground that the workman was not prepared to accept an admission limited to total incapacity only. The result was that the compensation offered was not accepted by the workman, and he applied to have the compensation fixed by arbitration :—

Held, that *Payne* v. *Fortescue & Sons* [1912] 3 K. B. 346 had not been overruled, but was distinguishable on the facts ; that a question had arisen within s. 1, sub-s. 3, of the Workmen's Compensation Act, 1906 ; and that there was jurisdiction to entertain the application. COOPER *v.* WALES, LIMITED - - - - **C. A. 210**

4. —— *Compensation—Basis of Calculation—Death—Employment by same Employer for Three Years—Interruptions—Average Weekly Earnings—Workmen's Compensation Act*, 1906 (6 *Edw.* 7, *c.* 58), *Sched. I., pars.* 1 (*a*) (i.), 2 (*c*).

In a claim for compensation under the Workmen's Compensation Act, 1906, by the dependant of a deceased workman it appeared that the deceased had been in the service of the same employers for the three years next preceding the accident, but had during that time been absent from work through illness on many occasions amounting altogether to about six months. His actual earnings during the three years amounted to 168*l.* 13*s.* 5*d.* :—

Held, that the case came within Sched. 1., par. 1 (*a*) (i.) of the Act, that par. 2 (*c*) did not apply, and that an award of 168*l.* 13*s.* 5*d.* compensation was right.

Perry v. *Wright* [1908] 1 K. B. 441 followed. GREENWOOD *v.* NALL & CO., LIMITED **C. A. 97**

5. —— *Compensation—Notice of Accident—Default in giving Notice—Employer prejudiced in his Defence—Evidence—Finding in the Proceedings—Burden of Proof—Workmen's Compensation Act*, 1906 (6 *Edw.* 7, *c.* 58), *s.* 2, *sub-s.* 1 (*a*).

The applicant on June 26, 1914, met with an accident in the course of his employment, which resulted in his losing the sight of one eye. No notice of the accident was given to the employer until July 6. In proceedings for compensation the county court judge found that there was no evidence before him on which he could find that the employer was not prejudiced in his defence by the want of notice, and dismissed the application :—

Held, on appeal, that the proviso in the Workmen's Compensation Act, 1906, s. 2, sub-s. 1 (*a*), that the want of notice shall not be a bar to proceedings in the cases there mentioned only applies when there is an express finding in the proceedings "that the employer is not . . . . prejudiced in his defence by the want," and that in the absence of such finding the appeal must be dismissed.

Hayward v. *Westleigh Colliery Co.* [1915] A. C. 540 explained and distinguished. MILLER *v.* RICHARDSON - - - - **C. A. 76**

EMPLOYER AND WORKMAN—*continued.*

6. —— *Compensation—Reasonable Cause for not making Claim within Six Months—Payment by Employer of Full Wages—Workmen's Compensation Act*, 1906 (6 *Edw.* 7, *c.* 58), *s.* 2.

A workman while in the employment of an employer as horsekeeper and van driver met with an accident in the course of and arising out of his employment by which his hand was severely crushed. Notice of the accident was given at once. The next day the employer sent for the workman and, after asking him about the accident, said, "You can potter about the factory until you are better." The workman continued to attend at the factory and did what work he could, receiving full wages all the time. At first the work he could do was little, but for about a month before his dismissal he was doing the work he had done before the accident, except part of the grooming of the horses. A little more than seven months after the accident he was dismissed for misconduct quite unconnected with the accident. He then claimed compensation. The only defence was that no claim had been made within six months of the accident:—

Held, that under the special circumstances of the case the failure to make a claim within six months was occasioned by reasonable cause within the meaning of s. 2 of the Workmen's Compensation Act, 1906.

Healey v. *Galloway* (1907) 41 Ir. L. T. R. 5 and *Lynch* v. *Marquis of Lansdowne* (1913) 48 Ir. L. T. R. 89 discussed and distinguished.
LUCKIE *v.* MERRY - - - **C. A. 83**

7. —— *Compensation—"Workman"—Contract of Service—Independent Contractor—Average Weekly Earnings—Deductions from Wages—Necessary Assistance—Workmen's Compensation Act*, 1906 (6 *Edw.* 7, *c.* 58), *s.* 13; *Sched. I.*, *par.* 2 (*a*).

A workman was employed as a dairyman on the terms of a written agreement which described the parties to it as employer and employee, provided that the latter should inter alia manage a herd of forty-five cows, and that several things should be done according to the instructions or desire or directions of the employer. The employer was to give 45*s.* a week with house and garden and certain extras. The employee kept a boy at 3*s.* 6*d.* a week to assist him in the work, and his own two sisters lived with him and helped in the dairy. He paid the boy's wages and boarded him and also paid allowances to, and the board of, his sisters. In proceedings by him for compensation under the Workmen's Compensation Act, 1906:—

Held, on the construction of the agreement, that the applicant was a "workman" within the Act and not an independent contractor; and that expenses of help given by younger members of the family who lived with the workman ought not to be deducted from his wages in the absence of an express contract or proof that he could not earn his wages without their assistance.
ROPER *v.* HUSSEY-FREKE - - **C. A. 222**

8. —— *Compensation—Workman in receipt of Compensation—Injury by Accident—Enlisting in Army—Serving Abroad—Suspension of Compensation—Workmen's Compensation Act*, 1906 (6 *Edw.* 7, *c.* 58), *Sched. I.* (14.), (18.)—*Workmen's Compensation Rules*, *r.* 66.

A workman who had been injured by accident within the meaning of the Workmen's Compensation Act, 1906, and was in receipt of compensation under an award during partial incapacity, enlisted in the Army and was sent with his regiment to India. The employers having applied for a review and termination of the compensation desired to have an opportunity of medically examining the workman, but in the circumstances they abandoned that application and asked for a suspension of the compensation on the grounds (1.) that by leaving the country the respondent had obstructed the holding of a medical examination under Sched. I. (14.) of the Workmen's Compensation Act, 1906; and (2.) that by ceasing to reside in the United Kingdom he had forfeited his right to compensation under Sched. I. (18.) of the Act:—

Held, that the workman had neither obstructed the medical examination nor ceased to reside in the United Kingdom within the meaning of the Act. J. & C. HARRISON, LIMITED *v.* DOWLING - - - - - - **C. A. 218**

ENEMY—Alien enemy.
See under ALIEN.

—— Shipping—Seaman—Wages—Termination of service—Detention in enemy port
See SHIPPING. 5. **627**

EVIDENCE—Contract—Writing—Rescission or variation—Subsequent parol agreement—Evidence—Admissibility - - **242**
See CONTRACT. 2.

—— Employer and workman—Compensation—Notice of accident—Default in giving notice—Employer prejudiced in his defence—Finding in the proceedings—Burden of proof - - - - **76**
See EMPLOYER AND WORKMAN. 5.

—— Insurance (Fire)—Consequential loss—Assessment of loss by insured's auditor—Arbitration—Evidence—Auditor as witness—Cross-examination—Conclusiveness of assessment - - **277**
See INSURANCE (FIRE).

—— Licensing Acts—Licence—Renewal—Reference to compensation authority—Differentiation - - - - **48**
See LICENSING ACTS.

—— Workmen's compensation—Seaman—Unexplained drowning—Inference—Conjecture - - - - - **344**
See EMPLOYER AND WORKMAN. 2.

EXECUTION—Alien enemy—Bank with office in London—Licence to carry on business—Licence subject to conditions—Judgment creditor issuing execution—Staying execution - - - - **154**
See ALIEN. 1.

"FEEBLE-MINDED PERSON"—Mental deficiency—Petition for order sending to institution—Petition by "the parent"—"Without visible means of support"—Jurisdiction as to costs of petition 418
See MENTAL DEFICIENCY.

FIAT OF ATTORNEY-GENERAL — Malicious prosecution—Reasonable and probable cause — Corroboration — Question for jury - - - - - - - 527
See MALICIOUS PROSECUTION.

FINANCE ACTS.
See under REVENUE.

FIRE INSURANCE.
See under INSURANCE (FIRE).

FISH—Whether winkles are fish — Fishery — Stealing fish from - - - - 9
See FISHERY.

FISHERY — *Stealing Fish from — Whether Winkles are Fish—Larceny Act*, 1861 (24 & 25 *Vict. c.* 96), *s.* 24.

By s. 24 of the Larceny Act, 1861, "Whosoever shall unlawfully and wilfully take . . . . any fish in any water . . . . in which there shall be any private right of fishery" shall on conviction be liable to a certain penalty, "provided that nothing hereinbefore contained shall extend to any person angling" between certain hours.

A corporation had a right of several fishery in a portion of a tidal river. The appellant, without any licence in that behalf from the corporation, when the tide was out collected winkles from small pools left by the receding tide in the bed of the river at a spot within the limits of the fishery:—

Held, that winkles, although incapable of being taken by angling, were "fish," and that there was evidence upon which the justices might find that the pools from which they were taken were "water" within the meaning of the section. LEAVETT *v.* CLARK - - Div. Ct. 9

FOOD AND DRUGS—Sale of.
See under ADULTERATION.

FRAUD — Arbitration—Staying proceedings—Arbitration clause in contract—Action for fraudulently inducing plaintiff to enter into contract - - - 167
See ARBITRATION.

GENERAL AVERAGE — Shipping — Ship and cargo in danger—Damage to dock—Tortfeasors—Contribution - - 586
See SHIPPING. 4.

GOODS—Sale of.
See under SALE OF GOODS.

GRANTOR—Bill of sale—Registration Occupation of grantor—Description - 593
See BILL OF SALE.

HAGUE CONVENTIONS, 1907, No. VI. - 627
See SHIPPING. 5.

HIGHWAY — Highway authority — Streets — Widening of street — Post Office—Removal of telegraph pole — Hole caused by removal improperly filled in —Liability of highway authority and Post Office - - - - - - 13
See STREETS. 2.

HORSE BREEDING — Income tax — Trade Deduction — Plant — Wear and tear—Business of horse breeding—Stallions' fees—Diminution in value owing to increasing age . - - - 374
See REVENUE. 4.

HOUSEBREAKING IMPLEMENTS — Criminal law—Workman's tools—Possession by night—Lawful excuse—Onus of proof
See CRIMINAL LAW. 696

HOUSING OF THE WORKING CLASSES—*Preventing Medical Officer from entering—Right of Entry for Survey and Examination—"Provisions of this part of this Act"—Housing of the Working Classes Act*, 1890 (53 & 54 *Vict. c.* 70), *s.* 51—*Housing, Town Planning, &c., Act*, 1909 (9 *Edw.* 7, *c.* 44), *ss.* 36, 47, 76.

By s. 51, sub-s. 1, of the Housing of the Working Classes Act, 1890, which is called the principal Act, if any person being the owner of any dwelling-house prevents the medical officer of health from carrying into effect with respect to the dwelling-house "any of the provisions of this part"—i.e., Part II.—"of this Act" after notice of intention so to do, a Court of summary jurisdiction may order such person to permit to be done on the premises all things requisite for carrying into effect with respect to the dwelling-house "the provisions of this part of this Act." By sub-s. 2, if at the expiration of ten days after service of the order such person fails to comply therewith he is liable to a penalty.

By s. 77, which is included in Part IV., headed "Supplemental," of the same Act, any person authorized by the local authority may in certain cases and under certain conditions enter any dwelling-house for the purpose of surveying and valuing the same. This section was repealed by the Housing, Town Planning, &c., Act, 1909, and replaced by s. 36, which is contained in Part I. of that Act under the heading "General Amendments," and enacts that any person authorized as therein prescribed by the local authority may at all reasonable times on giving twenty-four hours' notice enter any house . . . . (*c*) for the purpose of survey and examination where it appears to the authority that survey or examination is necessary in order to determine whether any powers under the Housing Acts should be exercised in respect of any house.

By s. 47, sub-s. 1, of the Act of 1909 it is enacted that any of the provisions of that Act which supersede or amend any provisions of the principal Act shall be deemed to be part of that part of the principal Act in which the provisions superseded or amended are contained.

By s. 76 of the Act of 1909 it is enacted that Part I. of that Act shall be construed as one with the principal Act and other Acts:—

Held, that the effect of this legislation was to make s. 36 (*c*) of the Act of 1909 part of

HOUSING OF THE WORKING CLASSES—*contd.*

Part II. of the principal Act, and that the owner of a house who prevented the medical officer of health from entering the house for purposes of survey and examination under s. 36 (*c*) of the Act of 1909 was liable under s. 51 of the principal Act to be ordered by a Court of summary jurisdiction to permit the medical officer to enter the house for the purposes aforesaid. ARLIDGE *v.* SCRASE - - - - - - **Div. Ct. 325**

HOUSING, TOWN PLANNING, &c.—Houses deemed to be unfit for human habitation—Back-to-back houses - - **249**
See LOCAL GOVERNMENT. 2.

—— Preventing medical officer from entering —Right of entry for survey and examination - - - - - - **325**
See HOUSING OF THE WORKING CLASSES.

HOUSING, TOWN PLANNING, &c., ACT, s. 17, sub-s. 2; ss. 39, 43 - - - 249
See LOCAL GOVERNMENT. 2.

—— ss. 36, 47, 76 - - - - - **325**
See HOUSING OF THE WORKING CLASSES.

ILLEGALITY — *Contract — Land Company — Newspaper professing to give the Public Honest Advice upon Dealings in Land—Bribe to Newspaper to suppress Comment—Restraint of Trade —Public Policy.*

The plaintiff was a director of a company which was engaged in selling land in Canada. The defendants were the proprietors of a weekly newspaper in which they held themselves out as giving honest advice to intending purchasers of Canadian land. The plaintiff agreed with the defendants, who owed him 1490*l.*, that if they paid him 750*l.* by certain instalments and observed the terms of the agreement in all respects he would accept 750*l.* in full satisfaction of their debt, but that on breach of any of the terms the whole 1490*l.*, less any sums paid on account, should immediately become due and payable. One of the terms was that the defendants should not publish in any periodical published by them any comment upon the plaintiff's land company, its directors, business or land, or upon any company with which the defendants had notice that the land company was connected or concerned. Upon a subsequent breach of this term by the defendants, the plaintiff brought this action under the agreement to recover the balance of the whole 1490*l.* :—

Held, affirming the decision of Atkin J., that the agreement was unenforceable, being vitiated by the term in question upon two grounds, namely, (1.) that the term was in restraint of trade and was wider than was reasonably necessary for the protection of the plaintiff, and (2.) that the term was void as being against public policy, inasmuch as it was not consistent with the proper conduct of the newspaper in the public interest. NEVILLE *v.* DOMINION OF CANADA NEWS COMPANY, LIMITED - **C. A. 556**

IMPOSSIBILITY OF PERFORMANCE.
See PERFORMANCE.

INCOME—Income tax—Deduction—Capital or income expenditure — Expenses of dredging and constructing deep water berth - - - - - - **267**
See REVENUE. 2.

INCOME TAX.
See under REVENUE.

INCORPORATED COMPANY.
See under COMPANY.

INLAND REVENUE.
See under REVENUE.

INSURANCE (FIRE) — *Consequential Loss — Assessment of Loss by Insured's Auditor—Arbitration — Evidence— Auditor as Witness—Cross-examination—Conclusiveness of Assessment.*

By a policy of insurance against fire on business premises an insurance company agreed to pay to the insured in the event of damage by fire to their property on account of annual net profit an agreed percentage on the amount by which the turnover in each month after the fire should in consequence of the fire be less than the turnover for the corresponding month of the year preceding the fire. The policy further provided that the amount of all losses under the policy should be assessed by the insured's auditors. During the currency of the policy property of the insured was damaged by fire. The auditors gave certificates stating the difference between the turnover for the months after and the corresponding months in the year before the fire, and the percentage payable. An arbitration was held to determine the amount payable under the policy. The auditors' certificates were put in evidence and a member of the firm of auditors was called as a witness by the insured and stated that when he gave the certificates he was satisfied that the losses of turnover stated therein were in fact sustained in consequence of the fire :—

Held, that the assessments of the auditor were conclusive evidence of the amount of the loss recoverable under the policy unless it were shown that the auditor had misdirected himself in point of law or had omitted to take into consideration some material fact; and that the auditor might be cross-examined, and the insurance company might call direct evidence, to show that the auditor had omitted to take into consideration the fact that the losses of turnover were wholly or in part due to other causes than the fire, but not to show that the auditor's conclusions of fact were erroneous. RECHER & CO. *v.* NORTH BRITISH AND MERCANTILE INSURANCE COMPANY - - - - **Div. Ct. 277**

INSURANCE (MARINE).—*Peril of Capture—Ship putting into Neutral Port to avoid Capture — Loss of Venture — Whether Loss proximately caused by Peril insured against.*

The plaintiffs shipped goods on board a German ship for carriage from Calcutta to Hamburg, and insured them on that voyage with the defendants against the usual perils, including men-of-war, enemies, and restraint of princes. While the goods were at sea war broke out between Great Britain and Germany, and the master on being informed of that fact put into a

INSURANCE (MARINE)—*continued.*

neutral port in order to avoid the risk of capture by hostile cruisers, and with the intention of suspending the further prosecution of the voyage until after the termination of the war. The commercial venture insured being thereby destroyed, the plaintiffs gave notice of abandonment to the defendants and claimed as for a total loss. At the time that the ship put into the neutral port she had not been chased by any hostile cruiser, nor had she even sighted one, but if she had continued her voyage the peril of capture would have been great :—

Held that, although to constitute a loss by capture actual capture was not necessary, the risk of such capture must have been imminent, and that the termination of the voyage by putting into a neutral port to avoid the risk of capture before the ship had gone into the zone of immediate danger, and before consequently the risk had begun to operate, was a loss which could not be regarded as proximately caused by the peril insured against, and that the plaintiffs could not recover. BECKER, GRAY & CO. *v.* LONDON ASSURANCE CORPORATION - **Bailhache J. 410**

2. —— *Running-down Clause—Damage in Consequence of Collision — Construction of Clause.*

By a policy of marine insurance upon the hull and machinery of a steamship it was agreed that if the ship thereby insured should come into collision with any other ship or vessel, and the assured should in consequence thereof become liable to pay, and should pay by way of damages to any other person or persons any sum or sums . . . . the underwriters would pay the assured a certain proportion of such sums.

The insured ship by reason of her negligent navigation came into collision with another ship which she was overtaking. The impact was very slight and had practically no effect. After the collision the other ship, by reason and as a direct consequence of the incidents of the collision, including the manœuvres properly adopted by her to minimize the effects of the collision, came into collision with a third ship, to which a large amount of damage was done. The owners of the insured ship having been held alone to blame for both collisions became liable to pay, and paid, sums in respect of damages arising out of both collisions. In an action brought by the owners of the insured ship to recover from the insurers the proportion underwritten by them of the sums so paid for damages :—

Held, that the right inference to be drawn from the facts as proved was that the collision with the third ship was a consequence of the collision between the insured ship and the other ship within the meaning of the clause, and that therefore the insurers were liable to pay to the owners of the insured ship the proportion they had underwritten of the damages arising out of both collisions.

Decision of Bailhache J. [1914] 3 K. B. 827 affirmed on other grounds. WILLIAM FRANCE FENWICK & CO., LIMITED *v.* MERCHANTS' MARINE INSURANCE COMPANY, LIMITED **C. A. 290**

INSURANCE (NATIONAL) — *Attachment of Debts—"Debt" — Practice — Fees payable by National Insurance Committee to Panel Doctor—National Health Insurance (Administration of Medical Benefit) Regulations*, 1912, *arts.* 39, 40, 42—*National Health Insurance (Medical Benefit) Regulations (England)*, 1913, *arts.* 35, 37—*National Insurance Act*, 1911 (1 *&* 2 *Geo.* 5, *c.* 55) — *Rules of the Supreme Court*, 1883, *Order* XLV., *r.* 1—*Issue as to Debt owing or accruing — Reference to Master to ascertain Amount—Appeal from Finding of Master.*

An insurance committee, acting under the National Insurance Acts, 1911 and 1913, and the Regulations made thereunder, entered into agreements with the panel doctors of their district, by which the whole amounts received by the committee from the National Insurance Commissioners were to be pooled and distributed among the panel doctors in accordance with a scale of fees ; the total amount available for medical benefit so received by the committee was to be the limit of their liability to the panel doctors ; and if the total pool was insufficient to meet all the proper charges of the panel doctors in accordance with the scale there was to be a pro rata reduction for each doctor, and on the other hand if it should be in excess of the amount required the balance was to be distributed among the panel doctors :—

Held, that where a panel doctor has done work under his agreement with the insurance committee, and the committee have received funds in respect of medical benefit from the National Insurance Commissioners, there is a debt owing or accruing from the insurance committee to the panel doctor which may be attached under Order XLV., r. 1, notwithstanding that as a matter of calculation the exact share payable to him may not yet have been ascertained.

Decision of Rowlatt J. [1915] 1 K. B. 811 affirmed.

Where a garnishee issue is tried by a judge without a jury, and the judge finds that there is a debt owing or accruing, but refers it to the Master to ascertain the amount with an order for payment of the amount so found to be due, an appeal from the finding of the Master lies to the Divisional Court and not direct to the Court of Appeal. O'DRISCOLL *v.* MANCHESTER INSURANCE COMMITTEE - - - **C. A. 499**

2. —— *Benefits under Part I. of National Insurance Act*, 1911 — *Married Woman whose Normal Occupation is Employment—Continuance of Employment—Temporary Unemployment on or after Marriage—Right to receive Benefits—National Insurance Act*, 1911 (1 *&* 2 *Geo.* 5, *c.* 55), *s.* 44, *sub-s.* 1—*Definition contained in s.* 79.

By s. 44 of the National Insurance Act, 1911, "Where a woman who has before marriage been an insured person marries, she shall be suspended from receiving the ordinary benefits under this Part" (i.e., Part I.) "of this Act until the death of her husband . . . . Provided that, where a woman who has been employed within the meaning of this Part of this Act before marriage, proves that she continues to be so employed after marriage, she shall not be so suspended so long as she continues to be so employed . . . ."

INSURANCE (NATIONAL)—*continued.*

By a definition contained in s. 79, "For the purposes of" Part I. of the Act, unless the context otherwise requires, a person "whose normal occupation is employment within the meaning of this Part of this Act shall, for the purpose of reckoning the number and rate of contributions, be deemed to continue to be an employed contributor notwithstanding that he is temporarily unemployed . . . .":—

Held, that a married woman cannot, under the sections, be suspended from receiving the ordinary benefits under Part I. of the Act if she is able to prove that she remains a person whose normal occupation is employment within the meaning of the Act, notwithstanding that she may become on or after her marriage temporarily unemployed. DAVIDSON *v.* NEW TABERNACLE (OLD STREET CONGREGATIONAL) APPROVED SOCIETY - - - - - - **Atkin J. 569**

INTEREST—"Yearly interest" - - **381**
See REVENUE. 1.

INTOXICATING LIQUOR (TEMPORARY RESTRICTION) ACT, 1914, s. 1 - 258
See LICENSED PREMISES.

JOINDER—Railway—Practice—Joinder of all railway companies parties to through rates as defendants - - - **616**
See RAILWAY. 2.

JOINT NOTE—Costs—Shorthand notes—Agreement—Costs in the cause—Practice
See COSTS. **194**

JUDGMENT CREDITOR—Alien enemy—Bank with office in London—Licence to carry on business—Licence subject to conditions — Judgment creditor issuing execution—Staying execution - **154**
See ALIEN. 1.

JURISDICTION — Bastardy — Jurisdiction of justices—Previous dismissal of application—Effect of new right of appeal to quarter sessions—Res judicata - **237**
See BASTARDY.

—— "Feeble-minded person"—Petition for order sending to institution—Petition by "the parent"—"Without visible means of support"—Jurisdiction as to costs of petition—Mental deficiency
See MENTAL DEFICIENCY. **418**

—— Justices.
See under JUSTICES.

—— Licensing—Licence duty—Right of lessee to recover increase of duty from lessor—Jurisdiction of county court - **59**
See LICENSING.

—— Offensive businesses—Duty to take proceedings for offence—Sanitary authority—"Default in doing their duty" under the Act—Proceedings by county council
See LONDON. 2. **305**

—— Workmen's compensation — Arbitration—Question arising — Liability to pay compensation—Duration of compensation - - - - - - - **210**
See EMPLOYER AND WORKMAN. 3.

JURY — Malicious prosecution — Question for jury—Fiat of Attorney-General - **527**
See MALICIOUS PROSECUTION.

JUSTICES—*Jurisdiction—Right to act in any Petty Sessional Division of County—Sale of Milk—Offence—Place of Delivery—Sale of Food and Drugs Act*, 1875 (38 *&* 39 *Vict. c.* 63), *s.* 20.

Sect. 20 of the Sale of Food and Drugs Act, 1875, provides that proceedings for the recovery of a penalty for an offence under the Act may be taken "before any justices in petty sessions assembled having jurisdiction in the place where the article or drug sold was actually delivered to the purchaser, in a summary manner":—

Held, that where the article has been delivered to a purchaser at a place situated in one petty sessional division of a county, the proceedings may be taken in another petty sessional division of the county before justices who usually sit and act in and for that other division.

Reg. v. *Beckley* (1887) 20 Q. B. D. 187 and *Caistor Rural District Council* v. *Taylor* (1907) 71 J. P. 310 approved and followed. REX *v.* BEACONTREE JUSTICES, ESSEX. REX *v.* WRIGHT **Div. Ct. 388**

—— Adulteration.
See under ADULTERATION.

—— Bastardy.
See under BASTARDY.

—— Children.
See under CHILDREN.

—— Cinematograph.
See under CINEMATOGRAPH.

—— Fishery — Stealing fish from — Whether winkles are fish - - - - - **9**
See FISHERY.

—— Food and drugs, Sale of.
See under ADULTERATION.

—— Housebreaking implements — Workman's tools — Possession by night — Lawful excuse—Onus of proof - - - **696**
See CRIMINAL LAW.

—— Housing of the working classes—Preventing medical officer from entering—Right of entry for survey and examination **325**
See HOUSING OF THE WORKING CLASSES.

—— Licensed premises—Sale or consumption of intoxicating liquor — Suspension—Gratuitous supply to friends of licensee—Offence—Order of licensing justices
See LICENSED PREMISES. **258**

—— Licensing Acts.
See under LICENSING ACTS.

—— Local government.
See under LOCAL GOVERNMENT.

—— Mine — Coal mine—Ventilation—Manager—Liability of - - - - - **23**
See MINES.

—— Motor car.
See under MOTOR CAR.

—— Sale of food and drugs.
See under ADULTERATION.

JUSTIFICATION—Libel—Discovery—Character and reputation—Particulars of justification—Acts occurring after date of libel
See DISCOVERY. 336

LAND—Defence of the realm—Naval and military authorities—Right to take posession of land and buildings without compensation - - - - - - 649
See WAR.

—— Landlord and tenant—Agricultural land—Duty of tenant to cultivate—Breach—Measure of damage - - 493
See LANDLORD AND TENANT. 1.

LANDLORD AND TENANT—*Agricultural Land—Duty of Tenant to cultivate—Breach—Measure of Damage.*

The duty of a tenant of agricultural land as declared by the common law and unaffected by express agreement is to cultivate the land in a good and husbandlike manner according to the custom of the country.

He is not further bound to deliver up the land at the end of the tenancy in a clean and proper condition, properly tilled and manured; nor is he necessarily bound or entitled to leave the land in the same condition as when he took it.

In case of a breach of his duty the measure of damage is the injury to the reversion occasioned by the breach. WILLIAMS *v.* LEWIS
Bray J. 493

2. —— *Licensed premises—Lease made before Finance* (1909-10) *Act*, 1910—*Increased Licence Duty—Liability of Grantor of Lease to pay Proportion of Increase—"Premium" payable by Lessee—Cost of rebuilding Premises by Lessee pursuant to Agreement for Lease—Surrender Value of prior Unexpired Lease—Finance Act*, 1912 (2 *& 3 Geo.* 5, *c.* 8), *s.* 2.

Where, in pursuance of an agreement for a lease of licensed premises made before 1910, the lessee has expended a large sum in rebuilding the premises and has surrendered an unexpired lease of the premises, and the lessor has then granted the lease, neither the sum so expended nor the surrender value of the prior lease is a "premium" payable by the lessee within s. 2 of the Finance Act, 1912, to be taken into account in determining what proportion, if any, of the increased duty can be recovered by the lessee from the lessor under s. 2.

Decision of the Divisional Court [1915] 1 K. B. 821 affirmed. KING *v.* EARL CADOGAN
C. A. 485

LARCENY — Fishery — Stealing fish from — Whether winkles are fish - - 9
See FISHERY.

—— Housebreaking implements — Workman's tools — Possession by night — Lawful excuse—Onus of proof - - 696
See CRIMINAL LAW.

LAWFUL EXCUSE — Criminal law — Housebreaking implements—Workman's tools—Possession by night—Onus of proof
See CRIMINAL LAW. 696

LEASE—Landlord and tenant.
See under LANDLORD AND TENANT.

LESSOR AND LESSEE — Licensing — Licence duty—Right of lessee to recover increase of duty from lessor — Jurisdiction of county court - - - - - 59
See LICENSING.

LIBEL — Justification — Discovery — Character and reputation—Particulars of justification—Acts occurring after date of libel - - - - - - - 336
See DISCOVERY.

See under DEFAMATION.

LICENCE—Alien enemy—Bank with office in London—Licence to carry on business—Licence subject to conditions—Judgment creditor issuing execution—Staying execution - - - - - 154
See ALIEN. 1.

—— Licensing—Licence duty—Right of lessee to recover increase of duty from lessor—Jurisdiction of county court - 59
See LICENSING.

—— Licensing Acts.
See under LICENSING ACTS.

LICENSED PREMISES—*Sale or Consumption of Intoxicating Liquor — Suspension — Gratuitous Supply to Friends of Licensee—Offence—Intoxicating Liquor (Temporary Restriction) Act*, 1914 (4 *& 5 Geo.* 5, *c.* 77), *s.* 1 — *Order of Licensing Justices.*

By s. 1, sub-s. 1, of the Intoxicating Liquor (Temporary Restriction) Act, 1914, licensing justices may by order direct that the sale or consumption of intoxicating liquor on licensed premises shall be suspended during such hours as may be specified in the order; and under sub-s. 2 if any person acts in contravention of an order under this section he is guilty of an offence.

An order of licensing justices directed that the sale or consumption of intoxicating liquor on licensed premises should be suspended on Sundays between 2.30 P.M. and 6 P.M., except in the case of bona fide residents in hotels.

At 4 P.M. on a Sunday beer was supplied gratuitously by the respondent, the landlord of licensed premises, to three men who were his personal friends and who drank the beer on the premises:—

Held, that the Act and order did not apply to a case where a licensee was entertaining his personal friends, and that the respondent had not acted in contravention of the order. BLAKEY *v.* HARRISON - - - - **Div. Ct. 258**

—— Landlord and tenant—Lease made before Finance (1909-10) Act, 1910—Increased licence duty—Liability of grantor of lease to pay proportion of increase—"Premium" payable by lessee—Cost of rebuilding premises by lessee pursuant to agreement for lease—Surrender value of prior unexpired lease - 485
See LANDLORD AND TENANT. 2.

—— Licensing.
See under LICENSING.

—— Licensing Acts.
See under LICENSING ACTS.

LICENSING—*Licence Duty—Right of Lessee to recover Increase of Duty from Lessor—Jurisdiction of County Court—Finance Act*, 1912 (2 *&* 3 *Geo.* 5, *c.* 8), *s.* 2.

By s. 2 of the Finance Act, 1912, the lessee of licensed premises may under the circumstances therein specified "recover as a debt due from . . . . the grantor of such lease . . . . so much of any increase of the duty payable in respect of the licence under the provisions of the Finance (1909-10) Act, 1910, as may be agreed upon as proportionate to any increase of rent . . . . payable in respect of the premises being let as licensed premises, and, in default of agreement, the amount proportionate to such increased rent . . . . shall be determined . . . . by a county court":—

Held, that the jurisdiction of the county court under that section was confined to determining the amount, and did not extend to the determination of the existence of the circumstances under which the liability of the grantor arose, or to the giving of judgment for the recovery by the lessee of the amount when determined. TRATT *v.* GOOD - **Div. Ct. 59**

—— Licensed premises.
See under LICENSED PREMISES.

—— Licensing Acts.
See under LICENSING ACTS.

LICENSING ACTS—*Licence—Renewal—Reference to Compensation Authority — Evidence — Differentiation—Licensing (Consolidation) Act*, 1910 (10 *Edw.* 7 *&* 1 *Geo.* 5, *c.* 24), *s.* 19.

The question of the renewal of the licence of an ante-1869 beerhouse was referred by the licensing justices to the compensation authority under s. 19 of the Licensing (Consolidation) Act, 1910, on the grounds that the house was unnecessary and that there was ample licensing accommodation in the district without it. Evidence was given before the compensation authority as to the situation, description, and trade of the house and of other licensed houses in the district and of their number. There was no evidence that the house compared unfavourably with the other houses in the district, and there was evidence that it was in some respects a better house than the licensed house, a beerhouse, situated near to it. The compensation authority refused the renewal of the licence:—

Held, that although there was no evidence that the house compared unfavourably with the other houses in the district, there was evidence on which the compensation authority was entitled to refuse the renewal of the licence. COLCHESTER BREWING COMPANY, LIMITED *v.* TENDRING LICENSING JUSTICES - - **Div. Ct. 48**

—— Licensed premises.
See under LICENSED PREMISES.

—— Licensing.
See under LICENSING.

LIMITATION OF LIABILITY — Shipping — Charterparty — Construction — Penalty clause or limitation of liability - **66**
See SHIPPING. 1.

LIMITATIONS, STATUTE OF—Market—Tolls —Payment for many years of tolls demanded under threat of seizure of goods—Payment under protest—Subsequent decision that tolls were not leviable — Unlawful demand — Mistake of fact—Recovery of payments—Action for money had and received - **106**
See MARKET.

LOCAL GOVERNMENT — *County Boroughs — Adjustment of Financial Relations to County—Appointment of Arbitrator to make Equitable Adjustment — Power of Arbitrator — Local Government Act*, 1888 (51 *&* 52 *Vict. c.* 41), *ss.* 23, 32, 62.

On the creation of the city of Cardiff and the borough of Swansea (which had theretofore been part of the administrative county of Glamorgan) as county boroughs, commissioners appointed under the Local Government Act, 1888, made an Order in 1892 as to the adjustment of the financial relations of the county boroughs with the county, one provision of which was that the cost of the maintenance of main roads should be taken into account before dividing the proceeds of the local taxation licences and estate duty grant. In 1909 the Local Government Board, being satisfied that that adjustment had become inequitable, appointed an arbitrator under s. 32, sub-s. 6, of the Act "to make a new equitable adjustment as if he were the commissioners under the Act." The arbitrator made an award which did not follow the principle on which the Order of the commissioners was made, and which made no allowance in respect of the cost of the maintenance of main roads:—

Held, that the arbitrator was not bound to follow the principle upon which the commissioners had acted in making their Order, and that he was not bound as a matter of law to take into account the cost of the maintenance of main roads. GLAMORGAN COUNTY COUNCIL *v.* CARDIFF CITY COUNCIL AND SWANSEA BOROUGH COUNCIL - - - - **C. A. 438**

2. —— *Houses deemed to be unfit for Human Habitation—Back-to-back Houses—Two-thirds of Space at Back of Houses contiguous—Remaining One-third of Space occupied by Air Shaft—Closing Order—Housing, Town Planning, &c., Act*, 1909 (9 *Edw.* 7, *c.* 44), *s.* 17, *sub-s.* 2; *ss.* 39 *and* 43.

By s. 17, sub-ss. 1, 2, and 3, of the Housing, Town Planning, &c., Act, 1909, if any dwelling-house appears to the local authority to be in a state so dangerous or injurious to health as to be unfit for human habitation, it is their duty to make a closing order, and any owner aggrieved by the order may appeal to the Local Government Board.

By s. 43 "it shall not be lawful to erect any back-to-back houses intended to be used as dwellings for the working classes, and any such house commenced to be erected after the passing of this Act shall be deemed to be unfit for human habitation . . . ."

Ten dwelling-houses were respectively erected over ten private motor garages. Each dwelling-house was designed for occupation with the garage beneath it and was occupied by a

LOCAL GOVERNMENT—*continued.*

chauffeur employed by the tenant of the garage and dwelling-house. Each dwelling-house could only be approached from the corresponding garage underneath, the approach being by a separate staircase. Five of the dwelling-houses with their corresponding garages faced in one direction and had to the extent of two-thirds common backs respectively with the remaining five dwelling-houses and garages which faced in the opposite direction, the remaining one-third of the space at the back of each pair of houses being occupied by a ventilating shaft. The local authority having made closing orders in respect of the dwelling-houses on the ground that they were "back-to-back houses intended to be used as dwellings for the working classes" within the meaning of s. 43 of the Act, the owner appealed to the Local Government Board:—

Held, on a case stated by the Board under s. 39, sub-s. 1 (*a*), of the Act for the opinion of the High Court, (1.) that the existence of the air shafts did not in point of law prevent the houses from being back-to-back houses within the meaning of the statute; (2.) that it was for the Local Government Board to determine as a matter of fact whether the houses were back-to-back houses; (3.) that a chauffeur is a member of the working classes in the ordinary and popular sense, and that as a matter of law it was open to the Local Government Board to determine whether as a matter of fact the houses were "intended to be used as dwellings for the working classes" within the meaning of s. 43 of the Act. WHITE *v.* ST. MARYLEBONE BOROUGH COUNCIL - - - **Div. Ct. 249**

3. —— *Public Health — Offence — Sale of Diseased Live Animal—Intended for Food of Man —No Exposure for Sale by Seller—Seizure and Condemnation of Carcase in Possession of Purchaser—Liability of Seller to Penalty—Public Health Act*, 1875 (38 *&* 39 *Vict. c.* 55), *ss.* 116, 117—*Public Health Acts Amendment Act*, 1890 (53 *&* 54 *Vict. c.* 59), *s.* 28.

A person who has sold diseased meat intended for human food cannot be convicted of an offence, under s. 117 of the Public Health Act, 1875, as amended by s. 28 of the Public Health Acts Amendment Act, 1890, for having sold it unless he has exposed it for sale.

The appellants, without having exposed it for sale, sold a diseased live bullock to a butcher, knowing that he intended to use it for human food. The butcher, having killed the bullock, divided the carcase, less the parts usually severed and removed, into two halves, and hung it up in his slaughter-house; the carcase was there seized by the medical officer of health and was condemned by a justice of the peace:—

Held, that the appellants could not be convicted of an offence under s. 117 of the Public Health Act, 1875, as amended by s. 28 of the Public Health Acts Amendment Act, 1890, for having sold the bullock because there had been no exposure for sale by them, and, further, because the article of food which had been seized and condemned was not the article which had been sold by them.

LOCAL GOVERNMENT—*continued.*

Firth v. *McPhail* [1905] 2 K. B. 300 and *Salt* v. *Tomlinson* [1911] 2 K. B. 391 considered. BOTHAMLEY *v.* JOLLY - - **Div. Ct. 425**

—— Children.
See under CHILDREN.

—— Housing of the working classes—Preventing medical officer from entering—Right of entry for survey and examination - - - - - - - **325**
See HOUSING OF THE WORKING CLASSES.

—— Streets.
See under STREETS.

LOCOMOTIVES ON HIGHWAYS ACT, 1896, s. 7 - - - - - - - 477
See MOTOR CAR.

LONDON—*District Surveyor —Power of London County Council to dismiss—Metropolitan Building Act*, 1855 (18 *&* 19 *Vict. c.* 122), *s.* 32—*Local Government Act*, 1888 (51 *&* 52 *Vict. c.* 41), *s.* 40, *sub-s.* 8—*London Building Act*, 1894 (57 *&* 58 *Vict. c. cxiii.*), *s.* 215, *sub-s.* 1, *and Sched. IV.*; *s.* 217.

By s. 32 of the Metropolitan Building Act, 1855, the Metropolitan Board of Works may "by order, at their discretion . . . . dismiss any existing district surveyor, with the consent of one of Her Majesty's principal Secretaries of State; they may suspend any such surveyor as last aforesaid; they may dismiss or suspend any future district surveyor, and in case of any suspension or during any vacancy they may appoint a temporary substitute."

By s. 40, sub-s. 8, of the Local Government Act, 1888 (51 & 52 Vict. c. 41), the powers, duties, and liabilities of the Metropolitan Board of Works were transferred to the London County Council.

By the London Building Act, 1894, s. 215, sub-s. 1, and the Fourth Schedule, the Metropolitan Building Act, 1855, is repealed.

By s. 217, "Officers appointed under any enactment hereby repealed shall continue in office in like manner as if this Act had not been passed":—

Held, that under the above sections the London County Council have power to dismiss a district surveyor appointed after August 14, 1855, at their pleasure. NOTLEY *v.* LONDON COUNTY COUNCIL - - - - - **Rowlatt J. 580**

2. —— *Public Health—Offensive Businesses — Duty to take Proceedings for Offences — Sanitary Authority—"Default in doing their duty" under the Act—Proceedings by County Council — Public Health (London) Act*, 1891 (54 *&* 55 *Vict. c.* 76), *ss.* 19, 100.

A duty to enforce the provisions of s. 19, sub-s. 1, of the Public Health (London) Act, 1891, relating to offensive businesses is imposed by that Act upon the sanitary authority, and therefore the sanitary authority by refusing to take proceedings to enforce those provisions make "default in doing their duty under this Act," within the meaning of s. 100, and the county council may institute the proceedings

LONDON—*continued.*

and, if successful, recover their expenses from the sanitary authority under the provisions of the latter section. LONDON COUNTY COUNCIL *v.* BERMONDSY BOROUGH COUNCIL - **Div. Ct. 305**

—— Rates.
See under RATES.

LONDON COUNTY COUNCIL—District surveyor —Power of London County Council to dismiss - - - - - - **580**
See LONDON. 1.

MAGISTRATES.
See under JUSTICES.

MALICIOUS PROSECUTION — *Reasonable and Probable Cause — Corroboration — Question for Jury—Fiat of Attorney-General.*

In an action for malicious prosecution the question whether the defendant took reasonable care to inform himself of the facts before he instituted the prosecution ought not to be left to the jury unless there is some evidence of his not having made proper inquiries; and the question whether the defendant honestly believed in the charge which he made ought not to be left to the jury unless there is some evidence of the absence of that belief.

There cannot be an absence of reasonable and probable cause when the Attorney-General has granted his fiat for the prosecution and it is not shown that the facts were put before him unfairly.

Decision of Bray J. affirmed. BRADSHAW *v.* WATERLOW & SONS, LIMITED - **C. A. 527**

MANAGER—Cinematograph exhibitions—Premises used for—Use in contravention of Act — Liability of occupier—Incorporated company—Manager of premises **1**
See CINEMATOGRAPH.

—— Mine — Coal mine—Ventilation—Manager —Liability of - - - - - - **23**
See MINES.

MARGARINE—Adulteration—Sale to prejudice of purchaser — Quality of article demanded — Mixed butter and margarine - - - - - - **685**
See ADULTERATION.

MARINE INSURANCE.
See under INSURANCE (MARINE).

MARKET—*Tolls—Payment for many Years of Tolls demanded under Threat of Seizure of Goods —Payment under Protest—Subsequent Decision that Tolls were not leviable—Unlawful Demand —Mistake of Fact—Recovery of Payments—Action for Money had and received—Statute of Limitations.*

From September, 1900, to June, 1912, the plaintiff carried on business as a dealer in produce in the vicinity of Spitalfields Market. As soon as he commenced business the defendant, who was the owner of the market, demanded tolls from him under threat of seizure of his goods if he refused to pay, and on the first occasion the plaintiff objected to pay, and actual seizure took place. The plaintiff then consulted

MARKET—*continued.*

a solicitor, and upon learning that other dealers outside the market paid tolls he, acting upon the solicitor's advice, paid the tolls under protest, and, thereafter, he, or his agents acting upon his instructions, always paid the tolls under protest. Subsequently, whenever the plaintiff challenged the defendant's right, or disputed the amount of tolls, in particular cases there was a seizure or threat of seizure followed by payment under protest.

From the decision in *Attorney-General* v. *Horner* (No. 2) [1913] 2 Ch. 140, it appeared that the tolls had been unlawfully demanded, and, in consequence, the plaintiff brought this action for money had and received to recover the tolls so paid, claiming that he paid them (1.) under a mistake of fact and (2.) not voluntarily but under the pressure of seizure of his goods:—

Held by the Court of Appeal, affirming the decision of Rowlatt J. on this point, that the plaintiff did not pay under a mistake either of law or fact, but because he found that other sellers were paying tolls and he did not wish to be involved in litigation with the defendant, and that the plaintiff could not recover under this head of claim; but

Held, further (Pickford L.J. doubting), reversing the decision of Rowlatt J. on this point, that the circumstances of the payments and the conduct of the plaintiff throughout the period of years showed that he only paid to avoid seizure of his goods and never made the payments voluntarily, or intended to give up his right to the sums paid or close the transaction, and that he was entitled to recover under this head of claim the sums paid during the last six years immediately preceding this action, the earlier payments being barred by the Statute of Limitations. MASKELL *v.* HORNER - **C. A. 106**

MARKS—Merchandise marks.
See under MERCHANDISE MARKS.

MARRIED WOMAN — Insurance (National Health)—Married woman whose normal occupation is employment — Continuance of employment—Temporary unemployment on or after marriage—Right to receive benefits - - **569**
See INSURANCE (NATIONAL). 2.

MASTER AND SERVANT — Workmen's compensation.
See under EMPLOYER AND WORKMAN.

MEDICAL EXAMINATION—Workmen's compensation - - - - - - **218**
See EMPLOYER AND WORKMAN. 8.

MEDICAL OFFICER—Preventing medical officer from entering—Right of entry for survey and examination - - - - - **325**
See HOUSING OF THE WORKING CLASSES.

MENTAL DEFICIENCY—"*Feeble-minded person*"—*Petition for Order sending to Institution —Petition by "the parent"—"Without visible means of support"—Jurisdiction as to Costs of*

MENTAL DEFICIENCY—*continued.*

Petition—Mental Deficiency Act, 1913 (3 & 4 *Geo.* 5, *c.* 28), *ss.* 1, 2, 6.

A "feeble-minded person" of full age is not "without visible means of support" within the meaning of sub-s. 1 (*b*) (i.) of s. 2 of the Mental Deficiency Act, 1913, merely because he has no means of his own and is incapable of earning his own living and is living with his parents, who are not legally liable to maintain him in their home.

Either parent of a "defective" can present a petition under s. 2 of the Act, but if it is presented by the mother, and the father can be found, his written consent or proof that it is unreasonably withheld is required by reason of the provisions of s. 6.

The judicial authority under the Act has jurisdiction in a proper case to order the costs of a petition to be paid by the local authority. REX *v.* RADCLIFFE (JUDGE). *Ex parte* OXFORDSHIRE COUNTY COUNCIL - - **Div. Ct. 418**

MERCHANDISE MARKS—*False Trade Description—"Lawfully and generally applied"—"Norwegian Sardines"—Merchandise Marks Act*, 1887 (50 & 51 *Vict. c.* 28), *s.* 2, *sub-s.* 2; *s.* 18.

The Merchandise Marks Act, 1887, s. 2, sub-s. 2, makes it an offence to sell goods to which a false trade description is applied. Sect. 18 provides that where, at the passing of the Act, a trade description was "lawfully and generally applied" to goods of a particular class, or manufactured by a particular method, the provisions of the Act with regard to false trade descriptions shall not apply to such trade description so applied.

At the time of the passing of the Act of 1887 there was a trade in England in the sale of small fish prepared in oil and packed in tins, under the description of "Norwegian sardines." Sardine is a French name for the pilchard. The persons engaged in the trade knew, but the purchasing public did not know, that the fish sold under the above description were not sardines, but were brisling, a Norwegian fish similar to the sprat. The respondents having sold in 1912 brisling prepared in the above manner under the description of "Norwegian sardines" were charged with an offence under s. 2, sub-s. 2, of the Act, and by way of defence relied on s. 18 of the Act:—

Held, that a trade description was not "lawfully" applied to goods within s. 18 if its use, although not involving the commission of a criminal offence, tended to mislead the public; that a trade description was not "generally" applied unless it was a conventional term in general use, not only by the persons engaged in the particular trade, but by the public at large; that the description "Norwegian sardines" was neither "lawfully" nor "generally" applied at the time of the passing of the Act of 1887 to brisling prepared in oil and sold in tins; and that the respondents were, therefore, guilty of the offence charged. LEMY *v.* WATSON **Div. Ct. 731**

MERCHANT SHIPPING.

See under SHIPPING.

METROPOLIS.

See under LONDON.

MIDWIVES—"*Misconduct*"—*Removal of Name from Roll—Decision of Central Midwives Board—Appeal—Statement in Nature of Evidence before Board not verified by Statutory Declaration—Inaccuracies in Statement—Midwives Act*, 1902 (2 *Edw.* 7, *c.* 17), *ss.* 3, 4—*Rules of Procedure on Removal of Name from Roll*, 1911, *r.* 2.

By s. 3 of the Midwives Act, 1902, power is conferred on the Central Midwives Board to frame rules regulating their own proceedings and to remove from the roll the name of any midwife disobeying the rules, "or for other misconduct."

By s. 4, "Any woman thinking herself aggrieved by any decision of the Central Midwives Board removing her name from the roll of midwives may appeal therefrom to the High Court of Justice . . . . but no further appeal shall be allowed."

By r. 2 of the Rules of Procedure, 1911, made by the Board, "All statements in the nature of evidence proposed to be relied on as part of the case against the accused person . . . . which cannot be laid before the Board by such evidence, shall be verified by statutory declaration. A copy of any such statutory declaration . . . . shall be supplied free of cost to the accused person before the day fixed for the meeting of the Board to deal with the case, or for the adjournment thereof."

By Order LIX., rr. 19 and 20, of the Rules of the Supreme Court, 1883, an appeal from any decision of the Central Midwives Board, under the Midwives Act, 1902, shall be made to the Divisional Court by notice of motion, and supported by affidavit, or, if the Court shall so direct on the hearing of the motion, by oral evidence, and the appeal shall be set down in the Crown paper for hearing as if it were an appeal from an inferior Court.

The appellant, a midwife whose name was upon the roll, was charged before the Board with having been guilty of misconduct within the meaning of s. 3 of the Act of 1902, in that she had been and still was cohabiting with a man not her husband. An inquiry took place before the Board, and at the first meeting she gave evidence. At an adjourned meeting, of which she had notice but at which she did not appear, the Board had before them a report by a relieving officer not verified by statutory declaration and of which no copy had been supplied to the appellant, as required by r. 2 of the Rules of Procedure, 1911. The Board decided that the appellant had not told the truth and removed her name from the roll. Certain statements in the report were inaccurate and might well have influenced the Board in arriving at their decision.

Held, (1.) that under rr. 19 and 20 of Order LIX. the Divisional Court had power to hear further evidence by way of affidavit, or oral evidence; (2.) that the misconduct dealt with by s. 3 of the Act of 1902 was not limited to misconduct in the discharge of the duties of a midwife, but included misconduct which in the opinion of the Board tended to unfit the midwife for the discharge of the duties of a midwife; (3.) that if the facts had justified the

MIDWIVES—*continued.*

Board in coming to the conclusion at which they had arrived, they would have been entitled, if they thought fit, to remove the appellant's name from the roll; but (4.) that as the report of the relieving officer had been irregularly admitted, and as it was impossible to say that the Board was not influenced by the inaccurate statements in it, the order removing the appellant's name from the roll must be quashed.

Semble, a full right of appeal is given by the Act of 1902. STOCK *v.* CENTRAL MIDWIVES BOARD - - - - - - **Div. Ct. 756**

MIDWIVES ACT, 1902—Rules of Procedure on Removal of Name from Roll, 1911, r. 2 *See* MIDWIVES. **756**

MILK—Justices—Jurisdiction—Right to act in any petty sessional division of county—Sale of milk—Offence—Place of delivery - - - - - - - **388** *See* JUSTICES.

MINES—*Coal Mine — Ventilation—Manager—Liability of—Coal Mines Act*, 1911 (1 *& 2 Geo.* 5, *c.* 50), *ss.* 29, 75, 101.

By s. 29 of the Coal Mines Act, 1911, "An adequate amount of ventilation shall be constantly produced in every mine to dilute and render harmless inflammable and noxious gases to such an extent that all shafts, roads, levels, stables, and workings of the mine shall be in a fit state for working and passing therein." The section does not say upon whom the duty is imposed.

Sect. 14, sub-s. 1: "For every mine there shall be appointed by the manager in writing one or more competent persons (hereinafter referred to as firemen . . . .) to make such inspections and carry out such other duties as to . . . . ventilation . . . . as are required by this Act and the regulations of the mine."

Held, (1.) that the duty of providing sufficient ventilation is imposed upon the persons having the management of the mine, and that in the event of a complaint of its insufficiency it is no defence for the manager to say that he had appointed a competent fireman under s. 14;

(2.) that the "shafts, roads, levels, stables, and workings of the mine" include portions of the mine contiguous thereto although not coming strictly within any of those denominations. ATKINSON *v.* MORGAN - - - **Div. Ct. 23**

"MISCONDUCT"—Midwife—Appeal—Rules of Procedure on Removal of Name from Roll - - - - - - - **756** *See* MIDWIVES.

MISTAKE—Market—Tolls—Payment for many years of tolls demanded under threat of seizure of goods—Payment under protest—Subsequent decision that tolls were not leviable—Unlawful demand—Mistake of fact—Recovery of payments—Action for money had and received—Statute of Limitations - - **106** *See* MARKET.

MONEY HAD AND RECEIVED—Action for—Market tolls—Payment for many years of tolls demanded under threat of seizure of goods — Payment under protest—Subsequent decision that tolls were not leviable—Unlawful demand—Mistake of fact—Recovery of payments—Statute of Limitations - - **106** *See* MARKET.

MOTOR CAR—*Brakes—Motor Car propelled by Steam exceeding Two Tons in Weight unladen—"Two independent brakes"—Reversible Engine—Band Brake acting upon Fly Wheel of Engine—Machinery common to Band Brake and Engine—Motor Cars (Use and Construction) Order*, 1904—*Motor Cars (Use and Construction) Amendment Order*, 1911—*Motor Cars (Use and Construction) Amendment Order*, 1913—*Locomotives on Highways Act*, 1896 (59 *& 60 Vict. c.* 36), *s.* 7.

By the Motor Cars (Use and Construction) Order, 1904, as amended by the Motor Cars (Use and Construction) Order, 1911, no person shall cause a motor car to be used on any highway unless the motor car shall have two independent brakes.

By the Motor Cars (Use and Construction) Order, 1913, in the case of a motor car propelled by steam and which exceeds two tons in weight unladen "the engine of that motor car, if it be capable of being reversed, shall be deemed to be the second independent brake."

By s. 7 of the Locomotives on Highways Act, 1896, a breach of any by-law made under the Act is, on summary conviction, punishable by a fine.

The appellant caused a steam motor car which exceeded two tons in weight unladen and had a reversible engine to be used on a highway. The only efficient brake other than the reversible engine was applied by means of a band which was brought to bear upon the periphery of the fly wheel of the engine, the braking power being transmitted from the fly wheel through the piston crank shaft and driving chain of the car to the back axle, and when the engine was out of gear, or if there happened to be a breakage of any of the machinery common to the fly wheel brake and the engine, the fly wheel brake could not operate as a brake nor could the engine be reversed so as to operate as a brake. The appellant having been convicted of causing the motor car to be used on the highway without having a brake independent of the engine:—

Held, that the conviction was right inasmuch as the motor car did not have two independent brakes within the meaning of the Orders; for if anything went wrong with one brake the other would be put out of action. The Orders required that there should be two independent brakes in the sense that one should work notwithstanding that the other could not, and that each should be able to work regardless of the other. CANNON *v.* JEFFORD - - - - - - **Div. Ct. 477**

MOTOR CARS (USE AND CONSTRUCTION) ORDER, 1904 - - - - **477** *See* MOTOR CAR.

MOTOR CARS (USE AND CONSTRUCTION) AMENDMENT ORDER, 1911 - **477** *See* MOTOR CAR.

MOTOR CARS (USE AND CONSTRUCTION) AMENDMENT ORDER, 1913 - 477
See MOTOR CAR.

MUNICIPAL CORPORATIONS ACT, 1882, s. 244, sub-ss. 1, 2 - - - - - 402
See PARLIAMENT.

NATIONAL HEALTH INSURANCE (ADMINISTRATION OF MEDICAL BENEFIT) REGULATIONS, 1912, arts. 39, 40, 42
See INSURANCE (NATIONAL). 1. 499

NATIONAL HEALTH INSURANCE (MEDICAL BENEFIT) REGULATIONS (ENGLAND), 1913, arts. 35, 37 - 499
See INSURANCE (NATIONAL). 1.

NATIONAL INSURANCE.
See under INSURANCE (NATIONAL).

NATIONALITY — Alien — Son born abroad of naturalized British subject—Status of son - - - - - - - - 716
See ALIEN. 2.

NATURALIZATION ACT, 1870, ss. 4, 10 - 716
See ALIEN. 2.

NATURALIZED BRITISH SUBJECT—Alien—Nationality — Son born abroad of naturalized British subject—Status of son - - - - - - - - 716
See ALIEN. 2.

NEWSPAPER—Bribe to newspaper to suppress comment—Illegality—Contract—Land company — Newspaper professing to give the public honest advice upon dealings in land—Restraint of trade—Public policy - - - - - 556
See ILLEGALITY.

NORWAY — Merchandise marks — False trade description—"Norwegian sardines"
See MERCHANDISE MARKS. 731

NOTICE — Employer and workman — Compensation—Notice of accident—Default in giving notice—Employer prejudiced in his defence—Evidence—Finding in the proceedings—Burden of proof - 76
See EMPLOYER AND WORKMAN. 5.

OCCUPIER — Cinematograph exhibitions — Premises used for—Use in contravention of Act — Incorporated company — Manager of premises — Liability of occupier - - - - - - 1
See CINEMATOGRAPH.

OFFENCES—Justices—Jurisdiction — Right to act in any petty sessional division of county—Sale of milk—Place of delivery
See JUSTICES. 388

—— Local government.
See under LOCAL GOVERNMENT.

OFFENSIVE BUSINESSES — Public health—Duty to take proceedings for offences—Sanitary authority—"Default in doing their duty" under the Act—Proceedings by county council - - - 305
See LONDON. 2.

ONUS OF PROOF — Criminal law — Housebreaking implements — Workman's tools — Possession by night — Lawful excuse - - - - - - 696
See CRIMINAL LAW.

PARLIAMENT—*Election—Returning Officer—Municipal Borough a County of itself—Parliamentary Borough with Two Mayors—Municipal Corporations Act*, 1882 (45 & 46 *Vict. c.* 50), *s.* 244, *sub-ss.* 1, 2—*Redistribution of Seats Act*, 1885 (48 & 49 *Vict. c.* 23), *s.* 12, *sub-s.* 4.

By a charter of 1764 the borough of C. was created a county of itself. It had from early times been a parliamentary borough, and down to 1832 had by itself returned a member to Parliament. By the Representation of the People Act, 1832, the borough of L. was appointed to share with the borough of C. in the election of a member of Parliament for C. The writ for the election of such member continued as theretofore to be directed to the sheriff of the county of the town of C. In 1913 L. was incorporated as a municipal borough.

The Municipal Corporations Act, 1882, provides by s. 244, sub-s. 1, that "In boroughs other than cities and towns being counties of themselves, the mayor shall be the returning officer at parliamentary elections"; and by sub-s. 2, "If there are more mayors than one within the boundaries of a parliamentary borough the mayor of that borough to which the writ of election is directed shall be the returning officer."

The Redistribution of Seats Act, 1885, s. 12, sub-s. 4, after reciting sub-s. 2 of s. 244 of the Act of 1882, enacted that: "In any such case the writ of election shall be directed to the mayor of that one of the municipal boroughs to the mayor of which the writ has before the passing of this Act been directed, or if it has not been directed to any such mayor, then to the mayor of that one of the municipal boroughs which has the largest population according to the last census for the time being, and in any such case the town clerk of the municipal borough, the mayor of which is the returning officer, shall be the town clerk who under the Registration Acts is to receive the revised lists of parliamentary voters from the revising barrister."

According to the last census taken in 1911 the borough of L. had a larger population than that of C. Upon the question who was entitled to receive from the revising barrister for the borough of C. the revised lists of parliamentary voters:—

Held, that there was nothing in the abovementioned sections to take away from the sheriff of C. his common law right to act as returning officer, and that the town clerk of C. was entitled to receive the revised lists of voters.

Decision of the Divisional Court [1915] 1 K. B. 299 affirmed. REX *v.* RICHARDS. REX *v.* WILLIAMS - - - - - - C. A. 402

PAROL AGREEMENT — Contract — Writing — Rescission or variation — Subsequent parol agreement — Evidence—Admissibility - - - - - - - 242
See CONTRACT. 2.

PAYMENT—County court—Bankruptcy—Order for payment of money—Whether action maintainable upon order - - 174
See COUNTY COURT.

—— Market—Tolls—Payment for many years of tolls demanded under threat of seizure of goods — Payment under protest—Subsequent decision that tolls were not leviable—Unlawful demand—Mistake of fact — Recovery of payments—Action for money had and received—Statute of Limitations - - - - - 106
See MARKET.

PENALTY — Shipping — Charterparty — Construction—Penalty clause or limitation of liability - - - - - 66
See SHIPPING. 1.

PERFORMANCE — Contract — Impossibility of performance—Implied condition—Sale of specific goods—Goods requisitioned by the Crown - - - - 676
See CONTRACT. 1.

PETITION—Mental deficiency—"Feeble-minded person"—Petition for order sending to institution—Petition by "the parent"—"Without visible means of support"—Jurisdiction as to costs of petition
See MENTAL DEFICIENCY. 418

"PLANT" — Revenue — Income tax—Trade—Deduction—Wear and tear—Business of horse breeding—Stallions' fees—Diminution in value owing to increasing age
See REVENUE. 4. 374

POLICE — Rates — Exemption from taxes and assessments—City of London—General rate—Consolidated rate—Police rate
See RATES. 1. 128

POOR RATES.
See under RATES.

POST OFFICE—Streets—Widening of street—Highway authority—Removal of telegraph pole—Hole caused by removal improperly filled in—Liability of highway authority and Post Office - 13
See STREETS. 2.

PRACTICE—Costs.
See under COSTS.

—— Discovery.
See under DISCOVERY.

—— Joinder.
See under JOINDER.

PREMIUM—Licensed premises—Lease made before Finance (1909-10) Act, 1910—"Premium" payable by lessee - 485
See LANDLORD AND TENANT. 2.

PREROGATIVE—War—Crown—Defence of the realm—Naval and military authorities—Right to take possession of land and buildings without compensation - 649
See WAR.

PRIVATE STREET WORKS.
See under STREETS.

PROHIBITION—Income tax—Jurisdiction of additional Commissioners—Appeal to General Commissioners—Prohibition to Commissioners - - - - 768
See REVENUE. 3.

PROOF—Employer and workman—Compensation—Notice of accident—Default in giving notice—Employer prejudiced in his defence—Evidence—Finding in the proceedings—Burden of proof - 76
See EMPLOYER AND WORKMAN. 5.

—— Housebreaking implements — Workman's tools — Possession by night — Lawful excuse—Onus of proof - - 696
See CRIMINAL LAW.

PROVISIONAL APPORTIONMENT — Local government — Street — Private street works—Premises not abutting on street—"Access through court, passage, or otherwise" - - - - - 707
See STREETS. 1.

PUBLIC HEALTH—Local government—Offences—Sale of diseased live animal—Intended for food of man—No exposure for sale by seller—Seizure and condemnation of carcase in possession of purchaser—Liability of seller to penalty
See LOCAL GOVERNMENT. 3. 425

—— Offensive businesses—Duty to take proceedings for offence—Sanitary authority
See LONDON. 2. 305

PUBLIC POLICY—Illegality—Contract—Land company — Newspaper professing to give the public honest advice upon dealings in land—Bribe to newspaper to suppress comment—Restraint of trade - - - - - - 556
See ILLEGALITY.

PUBLICATION—Libel—Communication posted in unclosed envelope - - - 32
See DEFAMATION.

QUARTER SESSIONS—Bastardy—Jurisdiction of justices—Previous dismissal of application—Effect of new right of appeal to quarter sessions—Res judicata - 237
See BASTARDY.

RAILWAY — *Light Railway — Application to Commissioners — One Written Application in respect of Scheme comprising several Railways—Application allowed in respect of some but refused in respect of other Railways—Right of Appeal to Board of Trade—"Application refused"—Light Railways Act*, 1896 (59 & 60 *Vict. c.* 48), *s.* 7, *sub-s.* 6.

Where an application is made, under s. 2 of the Light Railways Act, 1896, to the Light Railway Commissioners, by one written document, for an order authorizing the construction of what are described in the document as several light railways comprised in one scheme, and the Commissioners grant the application in respect of most but refuse it in respect of some of the railways, the document cannot be treated as

RAILWAY—*continued.*

containing a separate application in respect of each railway described, and an appeal will not lie to the Board of Trade against "the refusal of an application for a light railway" within the meaning of s. 7, sub-s. 6, of the Act.

So *held* by Swinfen Eady L.J. and Bankes L.J., Phillimore L.J. dissenting.

Decision of Divisional Court [1915] 1 K. B. 162 reversed. REX *v.* BOARD OF TRADE. REX *v.* LIGHT RAILWAY COMMISSIONERS - **C. A. 536**

2. —— *Practice—Railway and Canal Traffic—Undue Preference—Through Rates—Joinder of all Railway Companies Parties to Through Rates as Defendants—Railway and Canal Traffic Act*, 1854 (17 & 18 *Vict. c.* 31), *s.* 2—*Railway and Canal Traffic Act*, 1888 (51 & 52 *Vict. c.* 25), *s.* 27.

Messrs. Read, Holliday & Sons, Limited, alleged that the Midland Railway Company were charging them rates for goods carried over their railways in excess of the rates charged to their competitors in business, and applied to the Railway and Canal Commission Court for an order on the Midland Railway Company to stop this preference. They added the North Eastern Railway Company as parties on the ground that they had an agreement with the Midland Railway Company for charging through rates for traffic over their lines. The North Eastern Railway Company applied for an order that their name should be struck out of the proceedings on the ground that no question of through rates was involved and no relief could be asked against them. The Railway and Canal Commission refused the application on the ground that it had been settled by previous decisions of the Commissioners that where it was desired to investigate questions of through rates it was necessary that all the railway companies who were parties to the rates should be before the Court:—

Held, on appeal, that there was no settled practice of the Commission, where a through rate had to be investigated, to insist on all the parties to that rate being brought before them; and that where no order could be made against a defendant company, and their presence would not be a convenience to anybody, they ought not to be made parties. READ, HOLLIDAY & SONS, LIMITED *v.* MIDLAND RAILWAY COMPANY AND NORTH EASTERN RAILWAY COMPANY **C. A. 616**

RATES—*Exemption from Taxes and Assessments—City of London—General Rate—Consolidated Rate—Police Rate*—7 *Geo.* 3, *c.* 37, *s.* 51—*City of London Police Act*, 1839 (2 & 3 *Vict. c. xciv.*)—*City of London Sewers Act*, 1848 (11 & 12 *Vict. c. clxiii.*)—*City of London (Central Criminal Court House) Act*, 1904 (4 *Edw.* 7, *c. xciii.*)—*City of London (Union of Parishes) Act*, 1907 (7 *Edw.* 7, *c. cxl.*).

By s. 51 of the statute 7 Geo. 3, c. 37, it was provided that certain lands reclaimed from the river Thames should vest in the adjoining owners "free from all taxes and assessments whatsoever."

Before the passing of that Act there had been passed an Act of 10 Geo. 2, c. 22, for better

RATES—*continued.*

regulating the nightly watch and bedels within the city of London, which required the Corporation of the City to appoint watchmen and bedels for each of the City wards, and to give directions as to their arming, duties, and wages; and to order and direct the attendance of constables every night at each ward; and for the better raising and levying of moneys for paying the wages of the watchmen and bedels and other charges incident thereto, to direct the aldermen and common councilmen of each ward to make an equal rate and assessment upon all persons who should inhabit, hold, occupy, or enjoy any land, house, shop, warehouse, or other tenement within their respective wards.

Before the City of London Police Act, 1839, was passed there were acting within the City night watchmen paid out of the watch rate, 120 policemen paid out of the City's cash and not out of rates, and constables chosen from the wards and not paid.

The City of London Police Act, 1839, was passed to repeal the Act of 10 Geo. 2, c. 22, in order to render still more effective a certain system of police established instead of a nightly watch. By s. 58 it was enacted that a just and equal pound rate should be made upon every person who should inhabit, hold, occupy, possess, or enjoy any house within the several wards or within any precinct or place within the boundaries of such wards or adjoining thereto, whether such person should be then liable in respect of such house to be assessed to the relief of the poor, or be not liable to be assessed to the relief of the poor in respect thereof by reason of such house being situated in any precinct or extra-parochial place.

Both before and after the statute of 7 Geo. 3, c. 37, numerous Acts had been passed relating to the paving, cleansing, and lighting of streets in the city of London.

By s. 168 of the City of London Sewers Act, 1848, there was established a rate to be called the consolidated rate for making, maintaining, keeping in repair, paving, lighting, sweeping, cleansing, and watering the streets, and for making improvements and constructing, altering, repairing, and cleansing the sewers within the City, and for otherwise maintaining effectually the wholesome sewerage and drainage of the City, and defraying wages and all other incidental costs and expenses attending the execution of the powers thereby given. By s. 169 of the Act the rate was to be made upon every person who should inhabit, hold, occupy, possess, or enjoy any house or building within the City whether such person should be then liable in respect of such house or building to be assessed to the relief of the poor, or be not liable to be assessed to the relief of the poor in respect thereof by reason of any such house or building being situated in any precinct or extra-parochial place or otherwise, according to the full net annual value thereof.

By the City of London (Union of Parishes) Act, 1907, s. 15, certain rates including the police rate and the consolidated rate were to be assessed, made, levied, and collected as one rate to be termed the general rate.

RATES—*continued.*

In a general rate made by the respondents the appellants, who were occupiers of land and hereditaments reclaimed under the statute 7 Geo. 3, c. 37, as aforesaid, were rated thereto in respect of those lands. The general rate was made for (1.) expenses of paving, cleansing, lighting, improvements, and sanitary charges, and (2.) expenses in respect of police. It being admitted that the general rate might be analysed into its component parts :—

Held, that the appellants were liable to pay both that part of the general rate which represented the consolidated rate, namely, so much as was made for the expenses of paving, cleansing, lighting, &c., and also that part which was made for expenses in respect of the police, both being substantially new rates.

Sion College v. *London Corporation* [1901] 1 K. B. 617 followed.

Decision of the Divisional Court [1914] 2 K. B. 822 affirmed in part and reversed in part. ASSOCIATED NEWSPAPERS LIMITED *v.* CITY OF LONDON CORPORATION (No. 2) - **C. A. 128**

2. —— *Rating of Owner—Commission allowed to Owner—"Dwelling-house or tenement"—"Wholly let out in apartments or lodgings"—Part of House let as Office and Workshop—Representation of the People Act*, 1867 (30 *&* 31 *Vict. c.* 102), *s.* 7—*Poor Rate Assessment and Collection Act*, 1869 (32 *&* 33 *Vict. c.* 41), *s.* 3.

Two houses in a parliamentary borough were let out in different rooms, which, at the date of the passing of the Representation of the People Act, 1867, were not separately rated. One room in one of the houses was used as a workshop, and one room in the other house was used as an office; the remaining rooms in each house were let and used as dwelling-houses :—

Held, that neither of the houses was a "dwelling-house . . . . wholly let out in apartments or lodgings" within the meaning of the exception clause in s. 7 of the Representation of the People Act, 1867, and therefore that the rating authority were entitled under s. 3 of the Poor Rate Assessment and Collection Act, 1869, to receive the rates in respect of the hereditaments from the owners and to allow them a commission on the amount thereof where such owners agreed in writing to become liable for the rates and to pay the same whether the hereditaments were occupied or not.

Decision of the Divisional Court [1915] 1 K. B. 110 affirmed. REX *v.* CARSON ROBERTS. *Ex parte* MAYOR, &C., OF STEPNEY - **C. A. 313**

—— Railway.
See under RAILWAY.

RATING.
See under RATES.

RECITAL—Creditor—Recital of debt—Trustee—Right of trustee to deny existence of debt - - - - - - - **519**
See DEED OF ARRANGEMENT.

REDISTRIBUTION OF SEATS ACT, 1885, s. 12, sub-s. 4 - - - - - - **402**
See PARLIAMENT.

REGISTRATION—Bill of sale—Occupation of grantor—Description - - - **593**
See BILL OF SALE.

RENEWAL—Licence—Licensing Acts—Reference to compensation authority—Evidence—Differentiation - - **48**
See LICENSING ACTS.

REPRESENTATION OF THE PEOPLE ACT, 1867, s. 7 - - - - - - **313**
See RATES. 2.

RES JUDICATA—Bastardy—Jurisdiction of justices—Previous dismissal of application—Effect of new right of appeal to quarter sessions - - - - **237**
See BASTARDY.

RESCISSION—Contract—Writing—Rescission or variation—Subsequent parol agreement—Evidence—Admissibility - **242**
See CONTRACT. 2.

RESIDENCE—Youthful offender—Place of residence—Maintenance by local authority—Constructive or actual residence
See CHILDREN. **699**

RESTRAINT OF TRADE—Illegality—Contract—Land company—Newspaper professing to give the public honest advice upon dealings in land—Bribe to newspaper to suppress comment—Restraint of trade—Public policy - - **556**
See ILLEGALITY.

RETURNING OFFICER—Parliament—Election—Municipal borough a county of itself—Parliamentary borough with two mayors - - - - - - **402**
See PARLIAMENT.

REVENUE—*Income Tax—Banking Account—Interest on Credit Balance of Current Account—"Yearly Interest"—Income Tax Act*, 1842 (5 *&* 6 *Vict. c.* 35), *s.* 105.

The overseers of the poor for a certain district kept a current account with a bank, into which they paid the amounts collected by them as poor rate, and out of which from time to time they made the payments for which they were liable. Under a long-standing arrangement with the bank interest was allowed by the bank half-yearly at an agreed rate, without deduction of income tax, calculated upon the daily balances standing to the credit of the overseers.

The overseers, contending that they were trustees for charitable purposes only within s. 105 of the Income Tax Act, 1842, claimed an exemption from income tax in respect of the interest on the ground that it was "yearly interest" within that section. On a case stated raising this latter question only :—

Held, that the interest was not "yearly interest" within s. 105. GARSTON OVERSEERS *v.* CARLISLE (SURVEYOR OF TAXES)
Rowlatt J. 381

2. —— *Income Tax—Deductions—Capital or Income Expenditure—Expense of dredging and constructing Deep Water Berth—Income Ta*

REVENUE—*continued.*

Act, 1842 (5 & 6 *Vict. c.* 35), *s.* 100, *Sched. D, First Case, rr.* 1 *and* 3; *First and Second Cases, r.* 1.

The respondents' shipbuilding and engineering works at Barrow-in-Furness were approached by a channel which was open to all shipping and which it was the duty of the harbour authority to maintain. Subsequent to the respondents commencing business there in 1896 the harbour authority so neglected the maintenance of the channel that it began to silt up, and by gradual accretions it became much narrower and shallower so that it was no longer possible for vessels which could with safety get from and into the respondents' works in 1896 to continue to do so. A complete restoration of the channel to its original condition would have cost about 300,000*l.*, which sum the harbour authority found it impossible to provide in order to perform their admitted obligation, whereupon the respondents and the harbour authority agreed to complete a lesser and cheaper scheme which would make the channel sufficiently navigable. This involved the dredging of the channel to a depth of 2 ft. 6 in. instead of the 9 ft. at low water at which it was in 1896, and to make this practicable a deep water berth was placed at some distance from the bar to enable vessels to rest there and cross the bar at high water on the following tide. This work, which was carried out in 1912, was paid for by the respondents and the harbour authority, and the latter undertook its future maintenance. If this expenditure had not been incurred it would have been impossible for the respondents to deliver a British battle cruiser then completing construction at their works, and the expenditure enabled the respondents to earn the profits upon which they were assessed to income tax. The respondents claimed to deduct the amount expended by them in respect of the dredging and the construction of the deep water berth from their gross profits before ascertaining their taxable profits for 1912 under the Income Tax Acts:—

Held, that the expenditure was capital expenditure, and therefore that the respondents were not entitled to deduct it from their gross profits before ascertaining their taxable profits. OUNSWORTH (SURVEYOR OF TAXES) *v.* VICKERS, LIMITED - - - - **Rowlatt J. 267**

3. —— *Income Tax—If the Surveyor "discovers" that First Assessment is inaccurate—Additional First Assessment to be made—Jurisdiction of Additional Commissioners—Appeal to General Commissioners—Prohibition to Commissioners—Income Tax Act*, 1842 (5 & 6 *Vict. c.* 35), *ss.* 106, 161—*Taxes Management Act*, 1880 (43 & 44 *Vict. c.* 19), *s.* 52; *s.* 57, *sub-s.* 3.

By s. 52 of the Taxes Management Act, 1880, "If the surveyor discovers that any . . . . profits chargeable to the duties have been omitted from the first assessments, or that any person so chargeable has not made a full and proper or any return, or has not been charged to the said duties, or has been undercharged in the said first assessments, ... then" (sub-s. 2, amended by s. 23, sub-s. 2, of the Finance Act, 1907) "as regards duties chargeable under Schedule D . . . . the additional Commissioners shall . . . make an additional first assessment" on any such person in such sum as according to their judgment ought to be charged on him, subject to objection by the surveyor and to appeal.

By s. 57, sub-s. 3, "a person aggrieved by an assessment upon him included in any first or additional first assessment shall . . . . be entitled to appeal to the General Commissioners against such assessment . . . ."

Held, that under the above sections, coupled with the Income Tax Acts, the surveyor has jurisdiction to report if he "discovers"—i.e., if he honestly comes to the conclusion upon the information in his possession—that a person chargeable has not made a full and proper return to income tax, and that the additional Commissioners have jurisdiction then to make an additional assessment upon that person which is binding unless challenged by the means prescribed under the statutes.

Held, further, that the decision of the additional Commissioners can only be challenged by an appeal to the General Commissioners under s. 57, sub-s. 3, of the Taxes Management Act, 1880, whose decision is final subject to the right of the person assessed to require the statement of a case for the opinion of the High Court upon questions of law under s. 59, sub-s. 1, of the Act of 1880.

Held, therefore, that a writ of prohibition will not be granted to restrain the Commissioners from proceeding upon the assessment unless it can be shown that there were no grounds upon which the surveyor or Commissioners could honestly have believed that the person assessed is chargeable. REX *v.* BLOOMSBURY INCOME TAX COMMISSIONERS - - - **Div. Ct. 768**

4. —— *Income Tax — Sched. D — Trade — Deduction—Plant—Wear and Tear—Business of Horse Breeding—Stallions' Fees—Diminution in Value owing to Increasing Age—Customs and Inland Revenue Act*, 1878 (41 & 42 *Vict. c.* 15), *s.* 12.

Sect. 12 of the Customs and Inland Revenue Act, 1878, provides that in assessing the profits of a trade or concern in the nature of trade chargeable under Sched. D the Commissioners shall allow a reasonable deduction "as representing the diminished value by reason of wear and tear during the year of any machinery or plant used for the purposes of the concern:—

Held, that a stallion which earns fees for its owner, the proprietor of the business of a stud farm, by serving mares belonging to other persons is not "plant" within the meaning of s. 12, nor is the annual decrease in the value of the stallion, due solely to the effluxion of time, a diminution in its value "by reason of wear and tear" within the meaning of that section. EARL OF DERBY *v.* AYLMER (SURVEYOR OF TAXES) **Rowlatt J. 374**

—— Landlord and tenant—Licensed premises—Lease made before Finance (1909-10) Act, 1910 — Liability — "Premium" payable by lessee - - - **485**
See LANDLORD AND TENANT. 2.

REVENUE—*continued.*

—— Licence duty—Right of lessee to recover increase of duty from lessor—Jurisdiction of county court - - - - **59**
See LICENSING.

RULES OF THE SUPREME COURT, 1883, Order XLV. (Attachment of Debts), r. 1 **499**
See INSURANCE (NATIONAL). 1.

—— **Order LXV. (Costs), r. 27** - - - **194**
See COSTS.

RUNNING-DOWN CLAUSE—Damage in consequence of collision — Construction of clause - - - - - - - **290**
See INSURANCE (MARINE). 2.

SALE—Bill of sale.
See under BILL OF SALE.

—— Food and drugs, Sale of.
See under ADULTERATION.

—— Goods.
See under SALE OF GOODS.

—— Ship—Charterparty—Effect of sale of ship while charterparty still executory **367**
See SHIPPING. 2.

SALE OF FOOD AND DRUGS—Adulteration.
See under ADULTERATION.

SALE OF GOODS—*C.i.f. Contract—Payment against Shipping Documents—Outbreak of War before Tender of Documents—Goods carried in Enemy Ship—Trading with Enemy—Whether Buyers bound to accept Documents.*

The claimants, who were an English firm, sold on May 11, 1914, to the respondents, who also were an English firm, "about 300 barrels June and/or July shipment Chilian honey per steamer . . . . cost freight and insurance to Hamburg . . . . Payment net cash in Liverpool in exchange for shipping documents on presentation of same." The honey was shipped at Penco in June on board the German steamship *Menes* and by the bill of lading was to be carried to Hamburg, where it was to be delivered to the claimants or their assigns. A condition indorsed on the bill of lading provided that all questions arising thereunder were to be governed by the law of the German Empire and to be decided in Hamburg. On August 4, 1914, war was declared by Great Britain on Germany; on August 5 a Royal Proclamation was issued warning British subjects against trading in any goods destined for any person resident, carrying on business, or being in the German Empire; and on the same date the claimants tendered the shipping documents to the respondents, who, however, refused to accept the same. The *Menes* had not arrived at Hamburg at the date of the tender of the documents:—

Held, that the respondents were justified in refusing to accept the tender of the documents because the further performance of the contract would have involved a trading in goods destined for the German Empire in violation of the Royal Proclamation against trading with the enemy.

Decision of Atkin J. [1915] 1 K. B. 365 affirmed. DUNCAN, FOX & CO. *v.* SCHREMPFT & BONKE - - - - - - **C. A. 355**

SALE OF GOODS—*continued.*

—— Contract—Impossibility of performance—Implied condition — Sale of specific goods — Goods requisitioned by the Crown before delivery and before property passed to purchaser—Seller excused from performance of the contract - - - - - - - **676**
See CONTRACT. 1.

SANITARY AUTHORITY—Offensive businesses—Duty to take proceedings for offences—"Default in doing their duty" under the Act—Proceedings by county council
See LONDON. 2. **305**

SCHEME—Light railway—Application to Commissioners—Right of appeal to Board of Trade - - - - - - **536**
See RAILWAY. 1.

SEAMAN—Shipping—Ship—Wages—Termination of service—Detention in enemy port—"Loss of the ship" - - **627**
See SHIPPING. 5.

—— Workmen's compensation — Unexplained drowning—Evidence—Inference—Conjecture - - - - - - **344**
See EMPLOYER AND WORKMAN. 2.

SHIPPING — *Charterparty — Construction — Penalty Clause or Limitation of Liability.*

A charterparty contained the following clause: "Penalty for non-performance of this agreement proved damages, not exceeding estimated amount of freight":—

Held, that the clause provided a penalty and not a limitation of liability, and did not prevent the party complaining of non-performance from recovering the actual damages though exceeding the estimated amount of freight. WALL *v.* REDERIAKTIEBOLAGET LUGGUDE
Bailhache J. 66

2. —— *Charterparty—Effect of Sale of Ship while Charterparty still executory.*

By a berth contract made between shipowners and charterers the former agreed that their ship, the *Rosalia*, should proceed as ordered to Odessa and there load a complete cargo to be delivered at another port. Before the *Rosalia* proceeded to Odessa the shipowners sold her to a company with the benefit of the berth contract, and the purchasers declared that they accepted the excution of that contract. Notice of the sale was given to the charterers. The *Rosalia* was tendered at Odessa to the charterers, but they refused to load her, contending that by the sale of the ship the shipowners had put it out of their power to perform the contract. The original owners claimed damages for breach of contract to load, and the dispute was referred to arbitration under a clause in the contract. The arbitrator found as facts that the *Rosalia* was duly tendered under the berth contract and that both the original owners and the purchasers were always ready and willing to do all things necessary on their part towards the fulfilment of the contract, and that the vessel was not loaded solely by reason of the charterers' refusal to load her:—

Held, that upon these findings of fact, which meant that the original owners were always

SHIPPING—*continued.*

ready and willing to perform the contract personally and not merely through the purchasers, the original owners had not put it out of their power to perform the contract, and that the charterers were liable in damages for refusing to load the vessel.

Decision of Atkin J. [1915] 1 K. B. 307 affirmed. FRATELLI SORRENTINO *v.* BUERGER **C. A. 367**

3. — *Charterparty — Implied Condition — Tank Steamship—Time Charterparty—Employment for Carriage of Oil as Charterers should direct—Liberty to sub-let on Admiralty or other service—Requisition of Steamship by Admiralty —Employment for Transport of Troops—Effect of Requisition—Whether Charterparty put an end to or suspended.*

By a time charterparty a tank steamship was chartered to be employed in such lawful trades for voyages between any safe ports within certain limits for the carriage of oil as the charterers or their agents should direct. The charterparty contained an exception (inter alia) of "arrests and restraints of princes" and the charterers had the liberty of sub-letting the steamer on Admiralty or other service. During the currency of the charterparty the steamer was requisitioned by the Admiralty and after necessary alterations was employed by them in the transport of troops :—

Held, that there was no implied condition in the charterparty that the steamer should remain fit for the carriage of oil, and that the requisition by the Admiralty of the steamer did not put an end to or suspend the charterparty. F. A. TAMPLIN STEAMSHIP COMPANY *v.* ANGLO-MEXICAN PETROLEUM PRODUCTS COMPANY **Atkin J. 668**

4. —— *General Average Act — Ship and Cargo in Danger—Damage to Dock—Tortfeasors —Contribution.*

Liability for damage to property, where the damage is directly consequential on a general average act, may be the subject of a general average contribution, even assuming that the owners of ship and cargo were joint tortfeasors in relation to the damage.

The principle of common law laid down in *Merryweather* v. *Nixan* (1799) 8 T. R. 186 ; 1 Sm. L. C., 12th ed., p. 443, that there cannot be any contribution between joint tortfeasors is one which ought not to be extended and does not apply in the case of contribution in general average.

A ship and her cargo being in imminent danger from perils of the sea, the master and a pilot who was on board, having to choose between running her aground and entering S. Dock, with the probability of her injuring the dock, chose the latter alternative. In the attempt to enter the ship collided with one of the piers of the dock, sustained injury to the amount of 1600*l.*, and inflicted injury to the amount of 5000*l.* The Court found as a fact that to put into S. Dock with the knowledge that in doing so the ship would strike the pier was a reasonable and prudent thing to do in the interests of ship and cargo :—

SHIPPING—*continued.*

Held, that the taking of the ship into S. Dock was a general average act and that the owners of the ship were entitled to recover from the owners of the cargo contribution in general average both in respect of the injury to the ship and the injury to the pier, the loss being in each case the direct consequence of a general average act.

Decision of Bailhache J. [1915] 1 K. B. 833 affirmed. AUSTIN FRIARS STEAMSHIP COMPANY, LIMITED *v.* SPILLERS & BAKERS, LIMITED - - - - - - **C. A. 586**

5. —— *Seaman — Wages — Termination of Service—Detention in Enemy Port—"Loss of the ship"—Hague Conventions*, 1907, *No. VI.—Merchant Shipping Act*, 1894 (57 & 58 *Vict. c.* 60), *ss.* 143, 158.

A British ship, during the voyage for which a British seaman had signed articles, being in a German port when war was declared between the United Kingdom and the German Empire, was detained and not allowed to leave and the crew were imprisoned ; and the ship and crew were still detained and imprisoned when this action for an allotment of wages was commenced :—

Held by Swinfen Eady and Bankes L.JJ., Phillimore L.J. dissenting, that in the circumstances it had not been shown that the service of the seaman was terminated by the "loss of the ship" within s. 158 of the Merchant Shipping Act, 1894, or upon the ground that the further performance of the contract had become impossible as a commercial adventure, and that therefore he continued to be entitled to wages.

Decision of Rowlatt J. [1915] 2 K. B. 203 affirmed. BEAL *v.* HORLOCK - - **C. A. 627**

—— Insurance (Marine).
See under INSURANCE (MARINE).

—— Sale of goods — C.i.f. contract—Payment against shipping documents—Outbreak of war before tender of documents—Trading with the enemy — Whether buyers bound to accept document **355**
See SALE OF GOODS.

—— Seaman — Workmen's compensation—Unexplained drowning—Evidence—Inference—Conjecture - - - **344**
See EMPLOYER AND WORKMAN. 2.

SHORTHAND NOTES—Costs—Practice — Joint note—Agreement—Costs in the cause
See COSTS. **194**

SOLDIER—Workmen's compensation—Enlisting in Army—Serving abroad—Suspension of compensation - - - - **218**
See EMPLOYER AND WORKMAN. 8.

STALLIONS' FEES—Income tax—Business of horse breeding - - - - **374**
See REVENUE. 4.

STATUTES :—

1766.

7 Geo. 3, c. 37, s. 51 - - - - **128**
See RATES. 1.

STATUTES —*continued.*

1839.

2 & 3 Vict. c. xciv.—*City of London Police* 128
See RATES. 1.

1842.

5 & 6 Vict. c. 35, s. 100, Sched. D, First Case, rr. 1, 3; First and Second Cases, r. 1—*Income Tax* - - - - - - 267
See REVENUE. 2.

—— —— s. 105 - - - - - - 381
See REVENUE. 1.

—— —— ss. 106, 161 - - - - - 768
See REVENUE. 3.

5 & 6 Vict. c. 94—*Defence of the Realm* - 649
See WAR.

1844.

7 & 8 Vict. c. 66, s. 6—*Aliens* - - 716
See ALIEN. 2.

1848.

11 & 12 Vict. c. clxiii.—*City of London Sewers* 128
See RATES. 1.

1854.

17 & 18 Vict. c. 31, s. 2—*Railway and Canal Traffic* - - - - - - - 616
See RAILWAY. 2.

1855.

18 & 19 Vict. c. 122, s. 32—*Metropolitan Building* - - - - - - 580
See LONDON. 1.

1861.

24 & 25 Vict. c. 96, s. 24—*Larceny* - 9
See FISHERY.

—— —— s. 58 - - - - - - 696
See CRIMINAL LAW.

1863.

26 & 27 Vict. c. 112, s. 15—*Telegraph* - 13
See STREETS. 2.

1867.

30 & 31 Vict. c. 102, s. 7—*Representation of the People* - - - - - - 313
See RATES. 2.

1868.

31 & 32 Vict. c. 110, s. 2—*Telegraph* - 13
See STREETS. 2.

1869.

32 & 33 Vict. c. 41, s. 3—*Poor Rate Assessment and Collection* - - - 313
See RATES. 2.

1870.

33 Vict. c. 14, ss. 4, 10—*Naturalization* 716
See ALIEN. 2.

1875.

38 & 39 Vict. c. 55, ss. 116, 117—*Public Health* 425
See LOCAL GOVERNMENT. 3.

STATUTES—*continued.*

38 & 39 Vict. c. 63, s. 6—*Sale of Food and Drugs* - - - - - - - 685
See ADULTERATION.

—— —— s. 20 - - - - - - 388
See JUSTICES.

1878.

41 & 42 Vict. c. 15, s. 12—*Customs and Inland Revenue* - - - - - - 374
See REVENUE. 4.

41 & 42 Vict. c. 31, ss. 8, 10—*Bills of Sale* 593
See BILL OF SALE.

1879.

42 & 43 Vict. c. 30, s. 2—*Sale of Food and Drugs Act Amendment* - - 685
See ADULTERATION.

1880.

43 & 44 Vict. c. 19, s. 52; s. 57, sub-s. 3—*Taxes Management* - - - 768
See REVENUE. 3.

1882.

45 & 46 Vict. c. 50, s. 244, sub-ss. 1, 2—*Municipal Corporations* - - - 402
See PARLIAMENT.

1883.

46 & 47 Vict. c. 52, ss. 100, 168—*Bankruptcy* 174
See COUNTY COURT.

1885.

48 & 49 Vict. c. 23, s. 12, sub-s. 4—*Redistribution of Seats* - - - - - 402
See PARLIAMENT.

1887.

50 & 51 Vict. c. 28, s. 2, sub-s. 2; s. 18—*Merchandise Marks* - - - 731
See MERCHANDISE MARKS.

1888.

51 & 52 Vict. c. 25, s. 27—*Railway and Canal Traffic* - - - - - - 616
See RAILWAY. 2.

51 & 52 Vict. c. 41, ss. 23, 32, 62—*Local Government* - - - - - 438
See LOCAL GOVERNMENT. 1.

—— —— s. 40, sub-s. 8 - - - - 580
See LONDON. 1.

1889.

52 & 53 Vict. c. 49, s. 4—*Arbitration* - 167
See ARBITRATION.

1890.

53 & 54 Vict. c. 59, s. 28—*Public Health Acts Amendment* - - - - - - 425
See LOCAL GOVERNMENT. 3.

53 & 54 Vict. c. 70, s. 51—*Housing of the Working Classes* - - - - 325
See HOUSING OF THE WORKING CLASSES.

STATUTES—*continued.*

1891.

54 & 55 Vict. c. 76, ss. 19, 100—*Public Health (London)* - - - - - - 305
See LONDON. 2.

1892.

55 & 56 Vict. c. 57, s. 10—*Private Street Works* - - - - - - 707
See STREETS. 1.

1894.

57 & 58 Vict. c. 60, ss. 143, 158—*Merchant Shipping* - - - - - - 627
See SHIPPING. 5.

—— —— s. 158 - - - - - - 203
See SHIPPING. 2.

57 & 58 Vict. c. ccxiii., s. 215, sub-s. 1; Sched. IV.; s. 217—*London Building*
See LONDON. 1. 580

1896.

59 & 60 Vict. c. 36, s. 7—*Locomotives on Highways* - - - - - - - 477
See MOTOR CAR.

59 & 60 Vict. c. 48, s. 7, sub-s. 6—*Light Railways* - - - - - - - 536
See RAILWAY. 1.

1899.

62 & 63 Vict. c. 51, s. 8—*Sale of Food and Drugs* - - - - - - 685
See ADULTERATION.

1902.

2 Edw. 7, c. 17, ss. 3, 4—*Midwives* - - 756
See MIDWIVES.

1904.

4 Edw. 7, c. xciii.—*City of London (Central Criminal Court House)* - - 128
See RATES. 1.

1906.

6 Edw. 7, c. 58, s. 1—*Workmen's Compensation* - - - - - - - 344
See EMPLOYER AND WORKMAN. 2.

—— —— s. 1, sub-s. 1 - - - - 230
See EMPLOYER AND WORKMAN. 1.

—— —— s. 1, sub-s. 3 - - - - 210
See EMPLOYER AND WORKMAN. 3.

—— —— s. 2 - - - - - - 83
See EMPLOYER AND WORKMAN. 6.

—— —— s. 2, sub-s. 1 (*a*) - - - 76
See EMPLOYER AND WORKMAN. 5.

—— —— s. 13, Sched. I., par. 2 (*a*) - 222
See EMPLOYER AND WORKMAN. 7.

—— —— Sched. I., pars. 1 (*a*) (i.), (2) (*c*) 97
See EMPLOYER AND WORKMAN. 4.

—— —— Sched. I. (14.), (18.) - - 218
See EMPLOYER AND WORKMAN. 8.

1907.

7 Edw. 7, c. cxl.—*City of London (Union of Parishes)* - - - - - - 128
See RATES. 1.

STATUTES—*continued.*

1908.

8 Edw. 7, c. 67, s. 74, sub-s. 7—*Children* - 699
See CHILDREN.

1909.

9 Edw. 7, c. 30, s. 3—*Cinematograph* - 1
See CINEMATOGRAPH.

9 Edw. 7, c. 44, s. 17, sub-s. 2; ss. 39, 43—*Housing, Town Planning, &c.* - 249
See LOCAL GOVERNMENT. 2.

—— —— ss. 36, 47, 76 - - - - 325
See HOUSING OF THE WORKING CLASSES.

1910.

10 Edw. 7 & 1 Geo. 5, c. 24, s. 19—*Licensing (Consolidation)* - - - - - 48
See LICENSING ACTS.

10 Edw. 7 & 1 Geo. 5, c. cxvii., s. 25—*Bradford Corporation* - - - - 13
See STREETS. 2.

1911.

1 & 2 Geo. 5, c. 50, ss. 29, 75, 101—*Coal Mines* - - - - - - - 23
See MINES.

1 & 2 Geo. 5, c. 55—*National Insurance* 499
See INSURANCE (NATIONAL). 1.

—— —— s. 44, sub-s. 1 - - - - 569
See INSURANCE (NATIONAL). 2.

1912.

2 & 3 Geo. 5, c. 8, s. 2—*Finance* - - 59
See LICENSING.

—— —— s. 2 - - - - - - 485
See LANDLORD AND TENANT. 2.

1913.

3 & 4 Geo. 5, c. 28, ss. 1, 2, 6—*Mental Deficiency* - - - - - - - 418
See MENTAL DEFICIENCY.

1914.

4 & 5 Geo. 5, c. 12, s. 1—*Aliens Restriction*
See ALIEN. 1. 154

4 & 5 Geo. 5, c. 17, s. 1—*British Nationality and Status of Aliens* - - - 716
See ALIEN. 2.

4 & 5 Geo. 5, c. 47, s. 23—*Deeds of Arrangement* - - - - - - - 519
See DEED OF ARRANGEMENT.

4 & 5 Geo. 5, c. 58, s. 37, sub-s. 2—*Criminal Justice Administration* - - 237
See BASTARDY.

4 & 5 Geo. 5, c. 77, s. 1—*Intoxicating Liquor (Temporary Restriction)* - - 258
See LICENSED PREMISES.

5 Geo. 5, c. 8—*Defence of the Realm (Consolidation)* - - - - - - 649
See WAR.

STAYING EXECUTION—Alien enemy — Bank with office in London—Licence to carry on business—Licence subject to conditions — Judgment creditor issuing execution - - - - - - 154
See ALIEN. 1.

STAYING PROCEEDINGS — Arbitration — Arbitration clause in contract—Action for fraudulently inducing plaintiff to enter into contract - - - **167**
See ARBITRATION.

STEALING—Larceny.
See under LARCENY.

STREETS—*Private Street Works—Provisional Apportionment—Premises not abutting on Street —"Access through court, passage, or otherwise" —Local Government—Private Street Works Act*, 1892 (55 & 56 *Vict. c.* 57), *s.* 10.

By s. 10 of the Private Street Works Act, 1892, an urban authority about to execute private street works in any street may include in a provisional apportionment of the expenses of the works "any premises . . . . which do not front, adjoin, or abut on the street or part of a street, but access to which is obtained from the street through a court, passage, or otherwise," and which will in their opinion be benefited by the works.

The respondents, who were invested with the urban powers conferred by the Act of 1892, had included the appellant's premises in a provisional apportionment in respect of the estimated expenses of metalling, flagging, channelling, and making good a part (about 460 feet in length) of a street named Grange Lane, which was not a public highway or street.

The appellant's premises did not front or abut upon that portion of Grange Lane upon which the works were being carried on, but access therefrom to the premises was obtained through the remaining portion of Grange Lane, a length of about 516 yards :—

Held, that the words "court, passage, or otherwise" mean a court or passage or something in the nature of a court or passage, but do not mean a portion of the street itself; and therefore access to the appellant's premises was not obtained through a "court, passage, or otherwise" within the meaning of the section, and the section did not empower the respondents to include the appellant's property in the provisional apportionment.

Dictum of Lord Alverstone C.J. in *Newquay Urban Council* v. *Rickeard* [1911] 2 K. B. 846 explained. CHATTERTON *v.* GLANFORD RURAL DISTRICT COUNCIL - - - **Div. Ct. 707**

2. —— *Widening of Street — Highway Authority—Post Office—Removal of Telegraph Pole—Hole caused by Removal improperly filled in—Liability of Highway Authority and Post Office—Local Government—Telegraph Act*, 1863 (26 & 27 *Vict. c.* 112), *s.* 15—*Telegraph Act*, 1868 (31 & 32 *Vict. c.* 110), *s.* 2—*Bradford Corporation Act*, 1910 (10 *Edw.* 7 & 1 *Geo.* 5, *c. cxvii.*), *s.* 25.

A highway which was vested in the Bradford Corporation and over which very heavy traffic passed was at a certain point very narrow. The corporation under powers conferred upon them by a local Act determined to widen the highway by setting back the kerbstone and throwing the causeway into the road. On the edge of the causeway nearest the road there was a telegraph pole, which it was necessary to remove, and the corporation wrote to the Post Office authorities asking them to set back the pole to the improved street line. The Post Office accordingly had the pole removed and the hole filled in. Shortly afterwards the corporation threw the road open for traffic. A few days later a steam wagon belonging to the plaintiff was passing along the highway when one of its wheels sank into the hole and the wagon was considerably damaged. In an action brought by the plaintiff against the corporation and the Post Office authorities to recover damages for injury to his wagon caused by the negligence of the defendants :—

Held, that the defendants were liable, the corporation upon the ground that they were altering the character of part of an old road (i.e., in effect making a new road), and their duty was to so make it that when they threw it open for public use it should be reasonably safe for the purposes for which it was intended to be used; the Post Office authorities upon the ground that having done, perhaps voluntarily, a piece of work, they did it negligently.

McClelland v. *Manchester Corporation* [1912] 1 K. B. 118 and *Hill* v. *Tottenham Urban Council* (1898) 15 Times L. R. 53 followed.

Steel v. *Dartford Local Board* (1891) 60 L. J. (Q.B.) 256 distinguished.

Held, further, that the Telegraph Act, 1863, did not take away any responsibility which the corporation might be under independently of it. THOMPSON *v.* BRADFORD CORPORATION AND TINSLEY - - - - - **Div. Ct. 13**

—— Local government—Private street works—Provisional apportionment — Premises not abutting on street — "Access through court, passage, or otherwise"
See STREETS. 1. **707**

SURRENDER — Licensed premises — Lease—"Premium"—Surrender value of prior unexpired lease—Finance Act, 1912 **485**
See LANDLORD AND TENANT. 2.

SURVEY — Preventing medical officer from entering—Right of entry for survey and examination - - - - **325**
See HOUSING OF THE WORKING CLASSES.

SURVEYOR — District surveyor — Power of London County Council to dismiss **580**
See LONDON. 1.

TAXES—Inland Revenue.
See under REVENUE.

—— Rates.
See under RATES.

TELEGRAPH—Telegraph pole—Removal of—Hole caused by removal improperly filled in—Streets—Widening of street—Highway authority — Post Office — Liability of highway authority and Post Office - - - - - **13**
See STREETS. 2.

TENANT—Landlord and.
See under LANDLORD AND TENANT.

TOLLS—Market—Payment for many years of tolls demanded under threat of seizure of goods—Payment under protest—Subsequent decision that tolls were not leviable—Unlawful demand—Mistake of fact—Recovery of payments—Action for money had and received—Statute of Limitations - - - - - 106
See MARKET.

TORTFEASORS—Shipping—General average act—Ship and cargo in danger—Damage to dock—Tortfeasors—Contribution
See SHIPPING. 4. 586

TRADE—Income tax—Business of horse breeding - - - - - - - - 374
See REVENUE. 4.

—— Merchandise marks—False trade description—"Lawfully and generally applied"—"Norwegian sardines" - 731
See MERCHANDISE MARKS.

—— Restraint of—Illegality—Contract—Land company—Newspaper professing to give the public honest advice upon dealings in land—Bribe to newspaper to suppress comment—Restraint of trade—Public policy - - - - - - - 556
See ILLEGALITY.

TRUSTEE—Deed of arrangement—Creditor—Recital of debt—Trustee—Right of trustee to deny existence of debt - 519
See DEED OF ARRANGEMENT.

UNDUE PREFERENCE—Railway—Practice—Railway and canal traffic—Through rates - - - - - - - - 616
See RAILWAY. 2.

USE—Cinematograph exhibitions—Premises used for—Use in contravention of Act—Liability of occupier—Incorporated company—Manager of premises - 1
See CINEMATOGRAPH.

VENTILATION—Mine—Coal mine—Manager—Liability of - - - - - - 23
See MINES.

WAGES—Seaman—Termination of service—Detention in enemy port—"Loss of the ship" - - - - - - 627
See SHIPPING. 5.

—— Workmen's compensation—"Workman"—Contract of service—Independent contractor—Average weekly earnings—Deductions from wages—Necessary assistance - - - - - - 222
See EMPLOYER AND WORKMAN. 7.

WAR—*Crown—Prerogative—Defence of the Realm—Naval and Military Authorities—Right to take Possession of Land and Buildings without Compensation—Defence of the Realm Act*, 1842 (5 *& 6 Vict. c.* 94)—*Defence of the Realm (Consolidation) Act*, 1914 (5 *Geo.* 5, *c.* 8), *and Regulations thereunder.*

The Crown represented by the competent naval and military authorities has power in time of war, both by virtue of the Royal prerogative and also under the Defence of the Realm (Consolidation) Act, 1914, and the Regulations thereunder, to take possession of and occupy any lands or premises for the purposes of the defence of the realm without making compensation therefor to the owner.

The prerogative right is not limited to a case of actual invasion rendering immediate action necessary.

Decision of Avory J. affirmed. IN THE MATTER OF A PETITION OF RIGHT C. A. 649

WIDENING—Street.
See under STREETS.

WINKLES—Whether winkles are fish—Fishery—Stealing fish from - - - 9
See FISHERY.

WORDS—"Access through court, passage, or otherwise" - - - - - - 707
See STREETS. 1.

—— "Debt" - - - - - - - - 499
See INSURANCE (NATIONAL). 1.

—— "Discovers" - - - - - - 768
See REVENUE. 3.

—— "Dwelling-house or tenement" - 313
See RATES. 2.

—— "Feeble-minded person" - - - 418
See MENTAL DEFICIENCY.

—— "Go and find a job" - - - - 230
See EMPLOYER AND WORKMAN. 1.

—— "Loss of the ship" - - - - 627
See SHIPPING. 5.

—— "Misconduct" - - - - - - 756
See MIDWIVES.

—— "Norwegian sardines" - - - 731
See MERCHANDISE MARKS.

—— "Premium" - - - - - - 485
See LANDLORD AND TENANT. 2.

—— "Two independent brakes" - - 477
See MOTOR CAR.

—— "Workman" - - - - - - 222
See EMPLOYER AND WORKMAN. 7.

WORKING CLASSES—Housing of the.
See under HOUSING OF THE WORKING CLASSES.

WORKMAN—Employer and.
See under EMPLOYER AND WORKMAN.

WORKMAN'S TOOLS—Criminal law—Housebreaking implements—Possession by night—Lawful excuse—Onus of proof
See CRIMINAL LAW. 696

WORKMEN'S COMPENSATION.
See under EMPLOYER AND WORKMAN.

WORKMEN'S COMPENSATION RULES, r. 66 218
See EMPLOYER AND WORKMAN. 8.

YOUTHFUL OFFENDER—Local government—Place of residence—Maintenance by local authority—Constructive or actual residence - - - - - - 699
See CHILDREN.

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